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"A STRANGER TO ITS LAWS:" HOMOSEXUALITY, SCHEMAS, AND THE LESSONS AND LIMITS OF REASONING BY ANALOGY

Todd Brower*

I. INTRODUCTION

In *Romer v. Evans*,¹ the Supreme Court struck down Amendment 2 to the Colorado constitution, which prohibited state protection of lesbians and gay men² from discrimination, because it was class legislation violating the equal protection clause of the Fourteenth Amendment.³ The Court re-

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1. *Romer*, 116 S. Ct. 1620 (1996).

2. The author uses the terms "lesbians" and "gay men" when referring to women and men whose sexual orientation is same-sex and gay when referring to same-sex persons generally. By doing so, the author wishes to illustrate that the experience of same-sex orientation is often, but not exclusively mediated by gender. Accord Marc Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians And Gay Men*, 46 U. MIAMI L. REV. 511, 535-36 (1992). Moreover, the term "homosexual" carries connotations that same-sex orientation is primarily about sex, one of the dominant, misleading characteristics of the gay schema. Although some commentators and segments of the gay community employ the term "queer," this article does not. See, e.g., Francisco Valdes, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of "Sex," "Gender" and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 5 n.2, 347-49 (1995); Dan Levy, *A New Generation Bending the Rules: Young Gays, Lesbians Shed the Old Labels*, S.F. CHRON., April 28, 1994, at A1, A7.

Studies have shown that it is probably more accurate to refer to "homosexualities," as there is a diverse continuum of same-sex orientations. See, e.g., ALAN P. BELL & MARTIN WEINBERG, *HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN*, 53-61 (1978); ALFRED KINSEY, ET AL. *SEXUAL BEHAVIOR IN THE HUMAN MALE*, 636-55 (1948); see also, Janet Halley, *Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1723 (1993). Nevertheless, for the sake of simplicity, this article uses the term in the singular. Finally, the author avoids using the term "straight" to characterize heterosexuals or heterosexuality, as that term implies that lesbian and gay males are crooked or deviant. See Fajer, *supra* note 2, at 536 n. 119.

3. *Romer*, 116 S. Ct. at 1629.

jected the argument that Colorado merely denied special rights to its gay citizens and found "nothing special in the protections Amendment 2 withholds." The Court stated, "These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."⁴ The Court concluded that Amendment 2 classified lesbians and gay men, not to further a proper legislative purpose, but to make them unequal to everyone else. In so doing, the state had impermissibly made them "a stranger to its laws."⁵

Despite the Supreme Court's rejection in *Romer*, the treatment of gay people as separate (and unequal)⁶ and their consequent exclusion from legal protections, is a persistent feature of much current legal doctrine. Too often, the fact that a case involves lesbians and gay men causes an inability to see beyond that particular issue. An important component of the study of case precedent and reasoning by analogy is the ability to recognize when things are meaningfully similar or dissimilar and to treat them accordingly.⁷ As gay rights issues proliferate in the courts,⁸ however, judges and lawyers seem to have forgotten how to determine similarity and difference.⁹ Cases that are otherwise similar are decided differ-

4. *Id.* at 1627.

5. *Id.*

6. This word choice is deliberate. The Court in *Romer* recognized the emotional connotations of a reference to *Plessy v. Ferguson*, 163 U.S. 537 (1896). *Romer*, 116 S. Ct. at 1623; see *infra* notes 107-116 and accompanying text. Moreover, it also appreciated the legal consequences of gay people being treated as separate or different from the majority. *Romer*, 116 S. Ct. at 1625, 1627.

7. *E.g.*, MARILYN WALTER ET AL., WRITING AND ANALYSIS IN THE LAW 32-33 (Foundation Press 1995); *cf.* *Vacco v. Quill*, 117 S. Ct. 2293, 2295 (1997) (arguing the Equal Protection clause "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly").

8. In addition to *Romer*, decided in 1997, and *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Supreme Court has granted certiorari in *Oncale v. Offshore Servs., Inc.*, 83 F.3d 118 (5th Cir. 1996), *cert. granted*, 65 U.S.L.W. 3814 (Jun. 9, 1997) dealing with same sex sexual harassment. See also *infra* Part IV. As *Newsweek* magazine put it, in modern American life, homosexuality has gone "from 'the love that dare not speak its name' to 'the love that won't shut up.'" Jonathan Alter, *Degrees of Discomfort*, NEWSWEEK, Mar. 12, 1990, at 27.

9. *Cf.* Gina Torrielli, *Protecting the Nontraditional Couple in Times of Medical Crises*, 12 HARV. WOMEN'S L.J. 220, 229 (1989) ("One of the greatest hurdles for enforcement of unwritten contracts [between lesbians and gay male couples] may be the practical problem of persuading a judge unfamiliar with

ently when they involve lesbians and gay men.

This phenomenon is less puzzling than it appears at first glance. Psychologists have demonstrated that our perceptions of the world are shaped by schemas—a set of beliefs about people, events or situations that we use as guides in our interaction with these things.¹⁰ Having a schema about a person or thing enables us to know (or believe we know) a great deal about that person or thing in a shorthand fashion. Thus, we are able to treat that object or person in what we perceive to be an appropriate manner; that is, consistent with our schema.¹¹

For example, if we have a schema about chairs, we may have a pre-defined set of attributes for those objects: they have legs and a seat; they have support for our backs; they may or may not have arms; they are used to sit on; etc. Thus, we can accommodate a wide variety of chairs, from desk-chairs, to recliners, to rocking chairs, because we have fit them into our schema. If we are faced with a novel object, for example a beanbag chair, we test the limits of our schema. If

the gay community that lesbian and gay couples enter committed relationships and may expect support from each other.”).

10. *E.g.*, AARON BROWER & PAULA NURIUS, *SOCIAL COGNITION AND INDIVIDUAL CHANGE: CURRENT THEORY AND COUNSELING GUIDELINES* 14-15 (1993). There is an extensive psychology literature on schema theory. *Id.*; Nancy Cantor & John F. Kihlstrom, *Mental Representations of the Self*, in 17 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 1, 1-44 (L. Berkowitz, ed. 1984); NANCY CANTOR & JOHN F. KIHLOSTROM, *PERSONALITY AND SOCIAL INTELLIGENCE* (1989); Claudia E. Cohen, *Goals and Schemata in Person Perception: Making Sense from the Stream of Behavior*, in *PERSONALITY, COGNITION, AND SOCIAL INTERACTION* 45 (Nancy Cantor & John F. Kihlstrom eds., 1981); M.R. Gottfried & D. Robins, *Self Schemata, Cognitive Bias and the Processing of Therapeutic Experiences*, in *ADVANCES IN COGNITIVE-BEHAVIORAL RESEARCH AND THERAPY* 33, 33-39 (P.C. Kendall ed., 1983); E.J. LANGER, *MINDFULNESS* (1989); David Meichenbaum, *“Cognitive Behavior Modification,”* in *HELPING PEOPLE CHANGE: A TEXTBOOK OF METHODS* 346 (Frederick H. Kanfer & Arnold P. Goldstein eds., 3d ed. 1986); K. Stein, *Complexity of Self-Schema and Responses to Disconfirming Feedback*, 18 *COGNITIVE THERAPY AND RESEARCH* 161, 161 (1994); J. Bransford et al., *Teaching Thinking and Problem Solving*, 41 *AM. PSYCHOL.* 1078-89 (1986); A. Tversky & D. Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 *SCI.* 1124-31 (1974); A. Tversky & D. Kahneman, *Availability: A Heuristic for Judging Frequency Probability*, 5 *COGNITIVE PSYCHOL.* 207 (1973).

Other commentators have employed relatively similar constructs, without the same basis in empirical studies: Anthony Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons in Client Narrative*, 100 *YALE L.J.* 2107, 2123-24 (1991) (“pre-understanding”); Fajer, *supra* note 2, at 524-25; Gerald Lopez, *Lay Lawyering*, 32 *UCLA L. REV.* 1, 3, 5 (1984) (“stock story”).

11. See BROWER & NURIUS, *supra* note 10, at 14.

the key component of "chair" is its function, and we can sit in beanbag furniture, our chair schema will adapt to accept this object and treat a beanbag chair consistently with other chairs. Moreover, if our chair schema includes beanbags, we already know a great deal about that object, its use, where it belongs in a house, whether it is an appropriate plaything for children, etc. Conversely, if our chair schema primarily requires legs, we will resist incorporating the beanbag as a chair, resist its intended function, and resist treating it like other chairs.

Similarly, we interact with people in a manner consistent with our social schemas. We develop schemas which ascribe a range of characteristics to others corresponding to skin color,¹² sex,¹³ and other physical attributes.¹⁴ It is unsurprising, therefore, that people have a schema for lesbians and gay men and for homosexuality. We can quickly identify some characteristics of the popular schema about gay people.¹⁵ First, one such characteristic is that gay identity is

12. See generally Kenneth Clark & Mamie Clark, *Racial Identification and Preference in Negro Children*, in READINGS IN SOCIAL PSYCHOLOGY (T. Newcomb et al. eds., 1947). There is an extensive legal literature about race and racial perceptions. See, e.g., Neil Gotanda, *A Critique of Our Constitution is Colorblind*, 44 STAN. L. REV. (1991); Charles Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

13. See e.g., Wendy Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982). This article distinguishes between "sex" and "gender." In this article, "sex" refers to biological differences between men and women; "gender" denotes cultural or socially constructed characteristics associated with men or women. See J.E.B. v. Alabama ex rel T.B., 511 U.S. 127, 156 n.1 (1994) (Scalia, J., dissenting); Richard A. Epstein, *Gender Is for Nouns*, 41 DEPAUL L. REV. 981, 982 (1992). Thus, menstruation exemplifies a sex difference, the differing perception of a woman or a man in a dress illustrates a gender one.

14. David Stipp, *Mirror, Mirror on the Wall, Who's the Fairest of Them All?*, FORTUNE, Sept. 9, 1996, at 87 (describing the conclusions of a 1990 University of Pittsburgh study finding that businessmen's average yearly salary rose \$1,300.00 per inch of height—a six foot man made \$6,500.00 more in salary than one who was five feet, seven inches, and other studies of the correlation between physical attractiveness and success).

15. Professor Marc Fajer also pointed to the significance of these issues. See Fajer, *supra* note 2, at 514, 607.

There are, of course, a whole host of other aspects of the lesbians and gay male schema not directly relevant to the legal doctrines discussed in this article. For example, gay men are supposed to be more artistic, creative or stylish than non-gay men. See, e.g., *Cheers* episode in which Norm (George Wendt), in order to meet clients' expectations, pretends to be gay to obtain a job as an interior designer. *Cheers*, (NBC television broadcast, Dec. 8, 1988); George F. Cus-

about sex. Lesbians and gay men experience sexuality and sexual activity different from heterosexuals. Homosexuality, according to the schema, is omni-present, uncontrollable, and predatory. Sex is completely divorced from love, long-term relationships and family structures,¹⁶ all of which form part of the schema for heterosexuality.¹⁷ A second characteristic is that lesbians and gay men exhibit "cross-gender" or gender atypical behavior—behavior traditionally associated with the opposite sex.¹⁸ These aspects of the schema attached to lesbians and gay men leave their traces in legal doctrine, as many judges are unable to apply relevant legal precedent when gay persons and issues are involved.

Some of the most glaring examples have occurred under the sex discrimination prohibitions of Title VII of the Civil Rights Act of 1964.¹⁹ Judges have refused to equate same-sex sexual harassment with cross-sex harassment.²⁰ When a man harasses a woman, Title VII applies; when he harasses another man, it does not.²¹ Moreover, although courts recognize a Title VII cause of action against an employer when he²² requires conformity to traditional gender behavior for women;²³ no equivalent suit is permitted by an effeminate man, because gender-atypicality is conflated with homosexuality.²⁴

More broadly, homosexuality appears to inhibit proper application of precedent and reasoning by analogy when it

ten, *Strange Brew: Hollywood and the Fabrication of Homosexuality*, in QUEER REPRESENTATIONS, 119 n.9 (Martin Duberman ed., 1997) (discussing newspapers' accounts of Cole Porter being the interior decorator for his (and his wife's) apartment and his general sense of style as codedly identifying him as gay).

16. *Accord Bowers v. Hardwick*, 478 U.S. 186, 190-91 (1986) ("No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated . . . Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable.").

17. Fajer, *supra* note 2 at 514.

18. Fajer, *supra* note 2 at 607.

19. 42 U.S.C. § 2000(e) et seq. (1994).

20. *E.g.*, *Garcia v. Elf Atochem N. Am.*, 28 F.3d 444 (6th Cir. 1994); *Goluszek v. H.P. Smith*, 695 F. Supp. 1452 (E.D. Ill. 1988).

21. *Compare Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57 (1986), *with Garcia*, 28 F.3d at 446.

22. Although employers can be men, women, or genderless business organizations, this Article uses the masculine pronoun to refer to all employers.

23. *E.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

24. *E.g.*, *Dillon v. Frank*, 952 F.2d 403 (6th Cir. Jan. 15, 1992); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325 (5th Cir. 1978).

comes to larger social issues, such as child custody, the legal definition of family, and same-sex marriage. As commentators have pointed out, the arguments against same-sex marriage today are strongly reminiscent of those formerly marshaled against interracial marriage.²⁵ However, if one's schema of lesbians and gay men is that their couplings are simply about sex and are not love relationships,²⁶ it is unre-

25. See James Trosino, *American Wedding: Same-Sex Marriage and the Anti-Miscegenation Analogy*, 73 B.U. L. REV. 93, 93 (1993).

26. Even non-sexual meetings of lesbian and gay men are assumed to be sexual. See *Gay Student Servs. v. Texas A & M Univ.*, 737 F.2d 1317, 1323 (5th Cir. 1984) (discussing expert testimony that sex certainly followed any meeting of lesbian and gay male services organization); cf. 142 Cong. Rec. S. 9998, 104th Cong., 2d Sess. (Fri. Sept. 6, 1996) (remarks of Senator Nickles (R-Okla.) on the Employment Non-Discrimination Act ("ENDA"), Senate Bill 2056, which would have amended Title VII to add sexual orientation as a prohibited category). Senator Nickles stated,

In my days as an employer, I had a sales force. Sales people spend a lot of time together. They go on the road together. They travel together. They go to conventions together. They spend weeks together. What if an employer found out this person is a good salesman, has a good reputation, but he openly admits that he is bisexual. Now, that may be fine in some sales organizations but in some other sales organizations it will not be very popular. It will not be very popular. It will not be very popular with some of the spouses, maybe male and female. If an employer says, "Well, no, that person really will not fit into our organization. We do not think we should have promiscuous people in our sales team because of the time spent away from home, the time and travel, so I think that as a policy we will not do that." You say, "Wait a minute, this bill does not protect that. Wait a minute, this bill protects homosexuals and bisexuals." The very definition of bisexual means you are promiscuous. You are having sex with males and females. Bisexuals are protected under this bill.

Id.

The structure of Senator Nickles' logic is telling in several ways. The Bill protects bisexuals and homosexuals. Bisexuals, by definition, are attracted to both men and women. Consequently, they can never be satisfied with just once person, male or female. Therefore, they must be promiscuous, since no matter who they are with, they always want other sexual partners of the other sex. Moreover, they will seek these partners in the workplace, at the expense of other workers' marriages or commitments. The leap of logic in these last three sentences is enormous, until we remember that only heterosexuals have relationships based on love and family. Under Senator Nickles' schema, there is no notion of fidelity, selectivity, or even self-control in bisexuality. A bisexual must have these sexual urges and act on them indiscriminately.

Moreover, even if we accept his premise as to bisexuality, he would appear to then be arguing for an exclusion of only bisexuals from ENDA's anti-discrimination provisions. Logically, gay persons and non-gay persons alike are capable of fidelity since they are attracted to only one sex. His inferred placement of lesbians and gay men together with bisexuals is in contradistinction to non-gay persons. Thus, it illustrates that his schema of lesbians and gay men

markable that cases dealing with family, traditional relationships, or close emotional bonds are shunted aside as inapposite to gay relationships.²⁷ The gay identity as sex portion of the lesbian and gay male schema forms one of the bases underlying the different perspectives in the majority and dissenting opinions in *Romer v. Evans*.²⁸

Accordingly, this article takes a fresh look at Title VII and other jurisprudence which have been obscured by the distorting schemas of homosexuality in order to untangle faulty reasoned opinions. Part II discusses schema theory,²⁹ which is then illustrated in a discussion of *Romer v. Evans* and other doctrinal areas in Part III.³⁰ Part IV continues the application of schema theory to persistent problems under Title VII's prohibition of sex discrimination.³¹ Finally, Part V suggests that cognitive psychology schema research may provide insight not only into the roots of faulty legal reasoning, but also into techniques to correct it.³²

II. SCHEMAS AND LESBIANS AND GAY MEN

Current research in social cognition reveals that people store information about themselves and the world in the form of schemas—cognitive representations of events, objects and concepts.³³ Thus, when we reason by analogy, or learn from past experiences, we actually refer to our ability to extract meaning from our interactions with our environment or from cases, and apply those understandings to novel situations. We apply schemas developed from extracted information to make sense of these future events and cases.³⁴

Schemas are cognitive images that enable us to classify a

also excludes fidelity, selectivity, and self-control.

27. See, e.g., SASHA LEWIS, SUNDAYS WOMEN: A REPORT ON LESBIAN LIFE, 116 (1979) (discussing an Ohio judge who denied a lesbian mother custody of her children saying, "[o]rgasm means more to [lesbians] than children or anything else"); Opinion of James S. Gilmore, III Att'y Gen. of Va., 1994 Va. A.G. LEXIS 21 (July 22, 1994) (statute on domestic violence does not apply to homosexual co-habitants); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. App. 1974) ("There can be no doubt that there exists a rational basis for the state to limit the definition of marriage to exclude same-sex relationships.").

28. *Romer v. Evans*, 116 S. Ct. 1620 (1996).

29. See discussion *infra* Part II.

30. See discussion *infra* Part III.

31. See discussion *infra* Part IV.

32. See discussion *infra* Part V.

33. Claudia E. Cohen, *supra* note 10, at 49

34. CANTOR & KIHLSSTROM, *supra* note 10, at 108-14.

lot of information in compact paradigms, by using prototypical features. We extract and retain certain information because it is useful to us and consonant with our schema for that concept, and reject information when it is inconsistent or no longer useful.³⁵ We liberally edit information to fit a particular schema, and, as all schemas are idiosyncratic, it is neither necessarily accurate nor consistent with another's schema of the same thing.³⁶

As applied to people or to social situations, schemas inform us as to what is appropriate and how to act. For example, when we enter a restaurant, we call upon our "restaurant" schema that helps us delineate our expectations or behavior. Thus, we know when to wait for a table, how to signal the waiter, where and how to pay the check. These schemas are socially or culturally based. As anyone who has traveled in foreign countries can recognize, the American restaurant schema is not necessarily applicable or useful as a guide to ordering coffee in a café in Rome,³⁷ or figuring out how to leave a tip in Bonn.³⁸ Reasoning by analogy, or schema, is sometimes inapposite.

Moreover, blindly following an inappropriate schema can lead to unanticipated consequences. Carrying a beverage ordered at the bar to a table at a café may be consistent with U.S. restaurant schemas, but is dramatically violative of French ones, where location signifies a price and behavior difference.³⁹ A person who did so would be viewed as ignorant or perhaps as trying to get away with something to which he or she would not be entitled. In a similar fashion, following inappropriate schemas or legal precedent can lead to equally erroneous decisions. For example, the nineteenth

35. BROWER & NURIUS, *supra* note 10, at 14.

36. *Id.* at 14-15. For an interesting essay examining how historians' "plots" affect their narratives of environmental history by a process similar to schema theory, see William Cronon, *A Place For Stories: Nature, History, and Narrative*, J. AM. HIST. 1347, 1347-67 (1992) (describing the different histories of the Great Plains generated from the same historical evidence).

37. See, MARIO COSTANTINO & LAWRENCE GAMBELLO, *THE ITALIAN WAY* 6 (1996) (describing the practice of going to the cashier and paying for the order, then presenting the receipt (scontino) to the barman to receive the coffee); RICK STEVE, *RICK STEVE'S ITALY* 21 (1997).

38. See, RICHARD LORD, *CULTURE SHOCK—GERMANY*, 184-85 (1996) (describing the custom of handing the tip directly to the server, rather than leaving it on the table, or having it included on the credit card slip).

39. See, e.g., DAVID APPLEFIELD, *PARIS INSIDE OUT* 326 (1994).

century schema of woman as wife and mother was central to the Illinois Supreme Court's decision to prohibit the admission of female attorneys to the state bar in *Bradwell v. Illinois*.⁴⁰ This same view was shared by at least three justices of the United States Supreme Court; Justices Bradley, Swayne, and Field stated that the natural role of women made them unfit for work outside the home.⁴¹

Social schemas causes us to catalog people or legal problems in a short amount of time. As we encounter a person or an issue of first impression, we enlist schemas to register appropriate responses. The schema inclines us to attribute a range of beliefs, based on those schemas, to a person or event, to which we attach subsequent interpretations consonant with those impressions. For instance, our "good student" schema informs us that a person who gets good grades, is prepared for class, writes and speaks well. We may also attach negative characteristics to an otherwise positive schema; a good student may also signify socially inept or syncopantic. We may anchor feelings and emotions to that schema. If we see friendliness as a component of good student, we will feel friendly towards someone who is a good student. Conjointly, if we are feeling friendly towards someone, it is easier to perceive that person as a good student.⁴² Further, we may ascribe gender or ethnic characteristics to our schemas, so that maleness or Asian-Americanness⁴³ is associated with good student.

Schemas have both positive and negative functions. Schemas are crucial to our ability to function in the world. If we had to constantly analyze each piece of information, event

40. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 132 (1872) (quoting from the Illinois Supreme Court's opinion).

41. *Id.* at 141 (Bradley, J., concurring). Justice Bradley wrote that the natural role of women was as wives and mothers, positions inconsistent with a separate career as a lawyer. *Id.* Because his schema of women was restricted to these roles, he viewed the state's prohibition as not only consistent with family harmony and civil society, but with God and nature as well. Of course, the fact that both the schema and the decision were widely accepted at the time shows that schemas are deeply rooted in their time and culture. *Accord In re Lavinia Goodell*, 39 Wis. 232, 246 (Wis. 1875) (certain conversation in court not fit for women's ears, therefore, admitting women to the bar would ruin public decency and propriety).

42. BROWER & NURIUS, *supra* note 10, at 14.

43. See, e.g., Norimitsu Onishi, *Choosing Sides: After Approval of a Ban by the University of California Regents, Asian-Americans Face Yet Another Divide*, N.Y. TIMES, Mar. 31, 1996, § 4A, at 26.

or situation anew, we would either be paralyzed into inactivity or overwhelmed by minutia. Schemas, therefore, are one way to process the incessant stream of demands and inputs.⁴⁴ They permit us to understand others or new situations and to interact successfully with them after only an initial encounter. Further, this process occurs semi-automatically, with a relative lack of awareness.⁴⁵ We sort and classify information through schemas with little recognition of the fact that this triage is taking place.

On the other hand, we can employ schemas to blind ourselves to the reality of others, events, or concepts. We may, and often do, enlist inappropriate or inaccurate schemas, and thus make false analogies or distinctions, beginning a journey of erroneously anticipating and interpreting events and legal precedent.

Traditional legal reasoning by analogy follows this schema pattern. We apply precedent to the circumstances before us when a prior case is consistent with our understanding of the instant situation. Moreover, we conclude that the situations are congruent when our schema of one factual or legal pattern resonates with the other. Thus, a judge or legal scholar need not reanalyze each problem from scratch each time she encounters a new situation, but can rely on prior cases and doctrine. Of course, we are consciously applying precedent to make decisions. However, the processes of decision-making are often obscured or misattributed.⁴⁶

More specifically, the mechanics of schematic thinking correspond to legal analysis of precedent. Schema theory posits that people make decisions by prototype matching or representativeness heuristics. People rarely think logically about whether a person or situation falls into a particular category or analog. They do not methodically run through a checklist of relevant characteristics and rigorously compare the novel person or situation to their prototype or schema. Rather, they heuristically compare the person or situation before them with a prototype and classify the new person or

44. BROWER & NURIUS, *supra* note 10, at 28.

45. *Id.*; see generally, E.J. LANGER, MINDFULNESS (1989).

46. That a judge may base her decisions on other inputs than pure legal doctrine was one of the insights of the legal realist movement of the 1930's. See, e.g., JEROME FRANK, LAW AND THE MODERN MIND, 148-55 (Tudor Publishing CO., 1936). Critical Legal Studies often makes a similar point. See, e.g., MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES, 200-04 (1987).

situation with reference to how representative it appears of their prototype.⁴⁷ For example, we holistically recognize when an object is a chair. We usually do not rigorously compare that object to a list of all the characteristics associated with chairs, and then reach an explicitly reasoned conclusion.

Despite the belief that legal analysis requires carefully reasoned, rational decision-making,⁴⁸ we should, therefore, expect to find examples of prototype-matching in jurisprudence as well. For example, Justice Kennedy's majority opinion in *Romer v. Evans* illustrates how this mechanism operates in constitutional law.⁴⁹ As the dissent pointed out, the majority's opinion, holding that Amendment 2 lacks a rational relationship to legitimate state interests, did not reveal a rigorous analysis of past rational basis decisions or of Colorado's asserted legitimate state interests.⁵⁰ Rather, it was a holistic statement based on the fundamentals of Equal Protection.⁵¹ Justice Kennedy began by briefly summarizing the Court's rational basis decisions and jurisprudence.⁵² Next, the Court treated Amendment 2 as though it were far removed from other Equal Protection cases,⁵³ concluding "[i]t is not in our constitutional tradition to enact laws of this sort."⁵⁴ This law simply did not meet the majority's prototypical Equal Protection matter. The Court's opinion, characterized by the dissent as "so long on emotive utterance and so short on relevant legal citation,"⁵⁵ is actually a rather unremarkable example of legal prototype matching.

While perhaps puzzling to Justice Scalia, who attributes the Court's opinion as taking sides in a culture war,⁵⁶ the Court's decision-making process should be familiar to consti-

47. See BROWER & NURIUS, *supra* note 10, at 83-84, 86; Nancy Genero & Nancy Cantor, *Exemplar Prototypes and Clinical Diagnosis: Toward a Cognitive Economy*, 5 J. SOCIAL & CLINICAL PSYCHOL. 59, 59-78 (1987).

48. See, e.g., *Washington v. Glucksberg*, 117 S. Ct. 258 (1997) (Souter, J., concurring) (describing the method by which the Supreme Court analyzes a substantive Due Process case).

49. See *Romer v. Evans*, 116 S. Ct. 1620, 1623-29 (1996).

50. *Id.* at 1631-33 (Scalia, J., dissenting).

51. See, e.g., *id.*, 116 S. Ct. at 1627-29.

52. *Id.* at 1627.

53. *Id.* "First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation." *Id.*

54. *Romer*, 116 S. Ct. at 1628.

55. *Id.* at 1630 (Scalia, J., dissenting).

56. *Id.* at 1627, 1629 (Scalia, J., dissenting).

tutional legal scholars examining fundamental liberties under substantive due process.⁵⁷ The Court typically articulates a broad legal standard, looking for those fundamental liberties "deeply rooted in this Nation's history and tradition"⁵⁸ or "implicit in the concept of ordered liberty such that neither liberty nor justice would exist if [they] were sacrificed."⁵⁹ It then compares the asserted right or liberty in the case before it against standards and precedents in order to determine whether the present case is like or unlike the prototype. Note for example, the following statement from *Roe v. Wade*:⁶⁰ "This right of privacy, whether it be founded in the 14th Amendment's concept of personal liberty and restrictions on state action or . . . in the 9th Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."⁶¹ Indeed, the same pattern, this time rejecting the applicability of the paradigm to the instant situation, occurred in the Court's other statement on gay issues, *Bowers v. Hardwick*,⁶² discussing substantive due process. "[W]e think it evident that none of the rights announced in those cases bears any resemblance to the claimed right of homosexuals to engage in acts of sodomy that is asserted in this case"⁶³ . . . to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."⁶⁴

Justice Stewart's famous definition of hard core obscenity from *Jacobellis v. Ohio*, "I know it when I see it,"⁶⁵ is a more accurate assessment of legal and other reasoning than non-cognitive psychologists might like to admit. The problem

57. This includes all the critical baggage that goes along with that process. See generally, e.g., ROBERT BORK, *THE TEMPTING OF AMERICA* (1990); JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); MARK TUSHNET, *RED, WHITE AND BLUE* (1989).

58. *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (Powell, J.); *Griswold v. Connecticut*, 381 U.S. 479, 506 (1965).

59. *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

60. 410 U.S. 113 (1973).

61. *Id.* at 153.

62. 478 U.S. 186 (1986)

63. *Id.* at 190-91.

64. *Id.* at 194.

65. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

with this mode of analysis is not that he (or we) cannot recognize obscenity, fundamental liberties, sexual harassment, or other legal concepts, but that our prototype may be idiosyncratic—leading to inconsistent results.⁶⁶ This heuristic analytical mode may be both descriptive and normative for a cognitive psychologist;⁶⁷ it is not what constitutional scholars traditionally require of jurisprudence.

Herein lies the crux of schema theory to this article. The schema of lesbians and gay men used by most judges has prevented them from appropriately interpreting legal doctrine and precedent, and has led to anomalous results.⁶⁸ Moreover, the relatively non-rigorous nature of prototype-matching, which is a feature of legal and non-legal reasoning, has exacerbated this tendency toward inaccuracy and has distorted legal doctrine where lesbians and gay men are involved.

III. GAY IDENTITY AS SEX: FAMILY LAW AND *ROMER V. EVANS*

An important component of the erroneous lesbian and gay male schema is that gay identity⁶⁹ is solely a matter of sex—meaning, what happens in the bedroom.⁷⁰ Once judges

66. See generally, BROWER & NURIUS, *supra* note 10, at 82-83 (discussing the pitfalls of schemas in the diagnosis and treatment of mental health clients).

67. See BROWER & NURIUS, *supra* note 10 at 84.

68. See Lawrence *supra* note 12, for a similar discussion in the context of racial schemas. See Williams *supra* note 13, for a discussion of the way cultural values limit and shape legal doctrines using gender.

69. There is a lively debate among scholars on whether there is a gay and lesbian identity, and particularly whether one can properly use the terms lesbian or gay man to describe persons engaged in same-sex sexual activity prior to the mid nineteenth century. See, e.g., John Boswell, *Revelations, Universals and Sexual Categories*, in *HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST* 17, 19-34 (Martin Duberman et al. eds., 1989); Joseph Cady, "Masculine Love," *Renaissance Writing, and the "New Invention" of Homosexuality*, 23 J. HOMOSEXUALITY 9 (1992). Fortunately, I have no need to take sides in this debate as the thesis of this article does not depend on the correctness of any one of these positions. In fact, as Professor Daniel Ortiz points out, there may be no single definition of gay identity that can serve all purposes at all times. Daniel Ortiz, *Creating Controversy: Essentialism, Constructionism and the Politics of Gay Identity*, 79 VA. L. REV. 1833, 1850 (1993).

70. See, e.g., LEWIS, *supra* note 27, at 11 which states:

Something that people don't understand is that it's not *who* you go to bed with that determines if you're straight or gay. Sex has nothing to do with it. You can be celibate and gay. Identification as gay or straight is an emotional thing – do you relate primarily emotionally to women or to men in an intimate situation? . . . That was what was missing in my marriage. Sex was okay with him. What was missing

activate that element of the lesbian and gay male schema, a number of misapplications occur.

One commentator stated that "[o]ne of the greatest hurdles for enforcement of unwritten contracts [between gay couples] may be the practical problem of persuading a judge unfamiliar with the gay community that lesbian and gay couples enter committed relationships and may expect support from each other."⁷¹ The schema insists that a gay person does not have relationships, but merely sexual encounters—gay families are not real families.⁷² Accordingly, the law has rarely treated gay men and women as families. For example, members of gay couples have not been able to use Virginia's Domestic Violence statute⁷³ to enjoin violence against their cohabiting partners, even though the statute is not so limited.⁷⁴ Additionally, courts sometimes refuse to enforce support obligations between cohabiting gay couples, finding agreements in these relationships to be based on illicit meretricious consideration.⁷⁵ In *Jones v. Daly*,⁷⁶ a California appellate court found that the use of the term "lovers" as part of a gay couple's designation of their relationship, demonstrated

was the emotional intensity. I was never in love with him or with any other man. I didn't know what "in love" meant until I had my first lesbian relationship.

Id.

See generally, Fajer, *supra* note 2, at 537-70 (discussing the "sex as lifestyle" assumption and lesbian and gay male counter-examples).

71. Torielli, *supra* note 9, at 229.

72. Cf. *Dronenburg v. Zech*, 746 F.2d 1579, 1584 (D.C. Cir. 1984) (Starr, J., concurring in denial of rehearing en banc) (discussing homosexual relations and the constitution: "It simply cannot be seriously maintained that the right of privacy extends . . . beyond traditional relationships – the relationship of husband and wife, or parents to children, or other close relationships . . .") (emphasis added)); Lewis, *supra* note 27, at 116 (discussing an Ohio judge who denied a lesbian mother custody of her children saying, "Orgasm means more to [lesbians] than children or anything else.").

73. VA. CODE. ANN. § 18.2-57.2(A)-(C) (Michie 1994).

74. Opinion of James S. Gilmore III, Att'y Gen. of Va., 1994 Va. A.G. LEXIS 21 (July 22, 1994) (statute does not apply to homosexual co-habitants).

75. E.g., *Jones v. Daly*, 176 Cal. Rptr. 130, 133 (Cal. Ct. App. 1981) (rejecting, *inter alia*, gay male cohabitators' agreement for support because the court found that use of the term, "lovers" demonstrated that the agreement was based on sexual behavior, illicit meretricious consideration); *Wharton v. Dillingham*, 248 Cal. Rptr. 405, 409-10 (Cal. Ct. App. 1988) (enforcing a cohabitation agreement based on the value of services as bodyguard, chauffeur, social and business secretary, real estate investment partner and counselor, and not on the gay relationship which would have been illicit meretricious consideration).

76. 176 Cal. Rptr. 130 (Cal. Ct. App. 1981).

that the agreement was built on sexual behavior⁷⁷—even though “lover” is often used in the gay and lesbian community as the equivalent of spouse.⁷⁸

Nor is the devaluation of gay relationships limited to support and domestic violence statutes. Another example of skewed legal doctrine and misapplication of legal precedent will evidence the distorting effect of the lesbian and gay male schema. In *Palmore v. Sidotti*,⁷⁹ the Supreme Court held that private biases and the possible injury they might inflict are impermissible considerations in child custody determinations.⁸⁰ In this case, a White mother with custody of her White child had remarried an African-American man. The lower courts had taken custody away from the mother because “the wife has chosen for herself and her child, a lifestyle unacceptable to the father and to society.”⁸¹ Despite the social disapproval of the relationship, the Supreme Court stated that the potential for societal ostracism and the resulting injury to the child was not a sufficient reason to change custody from the mother to the father.⁸² By recognizing private prejudices in the courts, the state would be putting its imprimatur on them in violation of the Constitution.⁸³

However, if the event that holds the potential for social ostracism is the mother’s lesbianism, most courts either fail to recognize the parallels to *Palmore* or wrongly reject *Palmore* as inapposite precedent. Despite the obvious analogy to *Palmore*, many courts find it consistent to treat the mother’s relationship with a person of the same sex in the same manner as the mother’s relationship with a person of a different race, as treated by the trial court in *Palmore*.⁸⁴ In *S.E.G. v. R.A.G.*,⁸⁵ the Missouri court took custody of four minor children from a lesbian mother because Union, Missouri was a

77. *Jones*, 176 Cal. Rptr. at 132, 134.

78. *See, e.g.*, Fajer, *supra* note 2, at 536-37. Although the term does not necessarily have a single usage. *Id.* at 536 n.124.

79. 466 U.S. 429 (1984).

80. *Id.* at 433-34.

81. *Id.* at 431.

82. *Id.* at 433.

83. *Id.*

84. To be sure the Supreme Court has not treated race and homosexuality alike under the Constitution. *See, e.g.*, *Romer v. Evans*, 116 S. Ct. 1620, 1631 (1996) (Scalia, J., dissenting). The two situations are parallel, if not identical.

85. 735 S.W.2d 164 (Mo. Ct. App. 1987).

small community where gays were not common [he believed] nor openly accepted.⁸⁶ Therefore, the court believed it needed to protect the children from peer pressure, teasing and ostracism.⁸⁷ In *S.E.G.*, the court misread *Palmore* as being uniquely concerned with race discrimination.⁸⁸ However, other courts have followed *Palmore* and rejected societal intolerance of the mother as a reason to change custody.⁸⁹

Two facets of the *S.E.G.* court's opinion are striking. The lesbian and gay male schema of gay relationships as divorced from love, caring and stability⁹⁰ influenced the court's view of the relationship. The mother's behavior, which the court apparently viewed as an egregious departure from propriety, would be commonly accepted actions if a non-gay couple undertook them.

Wife and lover show affection for each other in front of the children. They sleep together in the same bed in the family home in Union. When the wife and the four children travel to St. Louis to see [lover], they also sleep together there. All of these factors present an unhealthy environment for minor children.⁹¹

But for the sex of the partner, one might have assumed that an affectionate relationship would have been a desirable role model. The same conduct by a cross-sex couple would be expected and would not be considered imposing behavior and beliefs upon the community of Union. Lesbian and gay male relationships are not supposed to exist, but if they do, they need to be hidden away, shamefully, behind closed doors and

86. *Id.* at 166.

87. *Id.* at 165; accord *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (citing *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985) (changing custody from lesbian mother and female partner to child's maternal grandmother. "[L]iving daily under conditions stemming from active lesbianism practiced in the home may impose a burden on the child by reason of the 'social condemnation' attached to such an arrangement, which will inevitably afflict the child's relationship with its 'peers and with the community at large.'")).

88. *S.E.G.*, 735 S.W.2d at 166.

89. Accord *Pater v. Pater*, 398, 588 N.E.2d 794, 799 (Ohio 1992) (rejecting a change in custody from Jehovah's Witness mother, even if child would be ostracized due to parent's religious beliefs and practices; following ruling in *Palmore v. Sidotti*, 466 U.S. 429 (1984)); e.g., *S.N.E. v. R.L.B.*, 699 P.2d 875, 878 (Alaska 1985) (*Palmore v. Sidotti*, 466 U.S. 429 (1984) applicable to reject social intolerance of lesbianism as the reason to change custody from an otherwise fit mother).

90. See *supra* notes 68-70 accompanying text.

91. *S.E.G.*, 735 S.W.2d at 166.

drawn curtains.⁹²

Moreover, the *S.E.G.* court viewed this behavior as flagrant defiance of social convention and morality that merited restrictions on visitation.⁹³ The court's language echoes that used by the lower Florida courts in *Palmore*.⁹⁴ As the Court stated in *Palmore*, "[T]he wife has *chosen* for herself and her child, a *lifestyle* unacceptable to the father and to society."⁹⁵ As the court stated in *S.E.G.*, "She [the mother] has *chosen* not to make her sexual *preference* private but invites acknowledgment and imposes her *preference* upon her children and her community."⁹⁶ Note the Florida court's use of the word "lifestyle" to describe an interracial marriage. "Lifestyle" is often used in the same deprecating way to trivialize gay and lesbian relationships.⁹⁷ This word choice reflects the inability of the speakers' schema of marriage to encompass interracial or same-sex relationships. The strangeness to modern ears of the word "lifestyle," as applied to interracial marriage, shows how the schema of marriage has changed in a quarter century.⁹⁸ That it does not sound equally strange when applied to lesbians and gay men illustrates the ingrained nature of the schema that reduces gay identity to sexual behavior. This reductionist view is an error.⁹⁹ In short, like their non-gay counterparts, lesbians and

92. The phenomenon of keeping one's gay identity secret, being "in the closet," is explored in EVE KOSOFKY SEDGWICK, *EPISTOMOLOGY OF THE CLOSET* (1990).

93. *S.E.G.*, 735 S.W.2d at 167.

94. *Compare S.E.G.*, 735 S.W.2d at 167, with *Palmore v. Sidotti*, 466 U.S. 429, 331 (1984).

95. *Palmore*, 466 U.S. at 431 (emphasis added).

96. *S.E.G.*, 735 S.W.2d at 167 (emphasis added).

97. *See generally, Romer*, 116 S. Ct. at 1634 (Scalia, J. dissenting).

98. Changes in legal doctrine do not always lead to, or reflect, changes in deeply held schemas. Early cases were filled with condemnation of interracial marriage as unnatural and arguments that recall the modern debate on same-sex marriage. *See e.g.*, *Green v. State*, 58 Ala. 190, 194 (1877); *Scott v. Georgia*, 39 Ga. 321, 323 (1869) (laws prohibiting interracial marriages as part of a divine plan); Trosino, *supra* note 25, at 108-111. Nevertheless, even as recently as the early 1980's, as reflected in the trial court record in *Palmore v. Sidotti*, 466 U.S. 429 (1984), interracial relationships were still considered by some not to be the equivalent of same-race marriages. This was some fifteen years after the Supreme Court struck down anti-miscegenation statutes in Virginia as violative of the Fourteenth Amendment's Equal Protection and Due Process guarantees. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

99. *See supra* note 70. *See generally, Fajer, supra* note 2, at 537-70 (discussing the "sex as lifestyle" assumption and lesbian and gay male counter-examples).

gay men have relationships, not relations; lives, not life-styles.

Note also the similarity between the two courts' view of the mothers' relationships as "choices" or "preferences" foisted upon their children and the world at large.¹⁰⁰ Describing the relationships as preferences devalues these relationships as mere predilections and reflects the schema of lesbian and gay male identity as being purely sexual behavior. If gay relationships are mere sexual couplings, it makes sense to speak of choice. After all, one might legitimately choose to be celibate or sexually active; one rarely speaks the same way about choosing to fall in love.

Indeed, the schematic identification of gay people as defined by their sexual activity has led to extreme results. Opponents have dismissed student organizations designed to provide support for lesbian and gay male students as mere opportunities for sexual encounters.¹⁰¹ A district court in Texas upheld the denial of official university recognition for a support group for lesbian and gay male students at Texas A & M University based, in part, on expert testimony that sexual activity would certainly take place at or shortly after group meetings.¹⁰² The University had previously granted recognition to a women's awareness group and a Black students' awareness group, whose roles in the University community paralleled those proposed by the lesbian and gay male organization.¹⁰³ Nevertheless, the University refused to recognize the gay organization because it feared recognition

100. See *infra* notes 95, 96 and accompanying text.

101. Carol Ness, *Stirring in the Heartland: Attitudes are Changing, But at a Sometimes Glacial Pace*, S.F. EXAM., June 24, 1996, at A6-7 (second of a seven part series titled, *Gay in America 1996*) (Ron Mullins, head of the Modesto, California, conservative, anti-gay Traditional Values Coalition, said that he opposed a high school group for gays because "all they want to do is have their little meetings in schools so that they can have their liaisons, and that's not right." "His view is that homosexuality is immoral, is all about sex. What about love?"); Mike Thomas, *Are Gay Rights A Civil Right?: David Caton Says No, and He Wants Florida Voters to Close the Debate Forever*, ORLANDO SENTINEL, July 18, 1993, at 8, 10 (discussing one Florida minister who believes that gay men want pro-gay laws passed so that they can "walk down the streets jacking off." (quoting Rev. James Sykes)).

102. *Gay Student Servs. v. Texas A & M Univ.*, 737 F.2d 1317, 1323 (5th Cir. 1984) (describing testimony by University's expert that "it would be a shock really, if there were not homosexual acts engaged in at or immediately after" gay student group's meetings).

103. *Id.* at 1323 n.10.

would lead to increased homosexual sexual conduct, in violation of the then existing Texas Penal Code.¹⁰⁴ The Fifth Circuit correctly rejected this conflation, recognizing that there is a difference between being a lesbian or gay man and engaging in homosexual activity.¹⁰⁵

The lesbian and gay male schema's reduction of gay and lesbian identity to sexual conduct underlies a significant part of the difference between the majority opinion and the dissent in *Romer v. Evans*,¹⁰⁶ the Supreme Court's most recent decision involving gay people. The Court began its opinion with Justice Harlan's dissent in *Plessy v. Ferguson* that the Constitution "neither knows nor tolerates classes among citizens."¹⁰⁷ Thus, in starting with *Plessy*, the Court emphasized that Colorado has attempted to treat certain of its citizens differently from others on the basis of who they are, not on their conduct.¹⁰⁸ "Homosexuals, by state decree, are put into a solitary class with respect to transactions and relations both in the private and governmental spheres."¹⁰⁹

Harlan's dissent in *Plessy* recognized the societal meaning and the class-based animus behind the Louisiana statute belying the formal equality of the law.

It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons¹¹⁰

104. *Id.* at 1320 n.4 (referring to a letter from the University Vice-President for Student Affairs explaining the denial); *id.* at 1322 n.7 (discussing the trial transcript).

105. *Id.* at 1328. *Accord* Ben-Sholom v. Secretary of the Army, 489 F. Supp. 964, 975 (E.D. Wis. 1980) (recognizing this difference in the context of discharge for violation of the military regulations against homosexual activity).

106. *Romer v. Evans*, 116 S. Ct. 1620, 1633 (1996) (Scalia, J., dissenting).

107. *Id.* at 1623 (Harlan, J., dissenting) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896)). Harlan's dissent in *Plessy* recognized the societal impact that racial segregation had, rather than limit himself to formal equality of the conduct of riding in a segregated railway carriage. *Id.*

108. Other commentators have seen significance to Justice Kennedy's citation to *Plessy*. *E.g.* Akhil Amar, *Attainder and Amedment 2: Romer's Rightness*, 95 MICH. L. REV. 203, 222 (1996).

109. *Romer*, 116 S. Ct. at 1625.

110. *Plessy*, 163 U.S. at 556-57 (Harlan, J., dissenting).

In contrast, Justice Brown's majority opinion viewed enforced separation in accommodations as mere reasonable regulations of behavior or conduct in public places:

Laws permitting, and even requiring, [the races'] separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police powers.¹¹¹

Any class-based denigration or badge of inferiority was the product of Black self-perception, and not the law.¹¹²

Like Justice Harlan, Justice Kennedy's majority opinion in *Romer* recognized the societal meaning and class-based animus of Amendment 2.¹¹³ Accordingly, his opinion focused on the effects of Amendment 2 on people—homosexuals. In contrast, the dissent began by speaking about *homosexuality*.¹¹⁴ Viewing Amendment 2 as "class legislation" directed at

What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.

Id. at 560 (Harlan, J., dissenting).

Perhaps the most striking part of *Plessy* to modern readers is the naturalness by which the majority and dissent assume a society hierarchically stratified by race with Whites as the dominant class. See, e.g., *id.* at 559 (Harlan, J., dissenting) ("The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty.") This naturalness of thought illustrates the schema of racial dominance underlying American society of the period. CHARLES LOFGREN, *THE PLESSY CASE* 95-115 (1987).

111. *Plessy*, 163 U.S. at 544.

112. *Id.* at 551 ("We consider the underlying fallacy of the plaintiff's argument to consist of the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it").

113. *Romer*, 116 S. Ct. at 1627-28.

114. *Id.* at 1629 (Scalia, J., dissenting) Scalia stated:

In holding that homosexuality cannot be singled out for disfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago, see *Bowers v. Hardwick*, 478 U.S. 186 (1986), and places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias . . . This Court has no business . . . pronouncing that 'animosity' against homosexuality . . . is evil.

unpopular persons is central to the Court's rejection of the law as unconstitutional,¹¹⁵ just as the core of the dissent's perspective is that the law targets conduct or persons defined

The lesbian and gay male schema of gay identity as sex permeates the dissent's view of *Romer*. Justice Scalia's language rejecting the distinction between homosexuals and those engaging in same-sex sexual activity for the purpose of the facial challenge to Amendment 2 is illuminating.

Some individuals of homosexual 'orientation' who do not engage in homosexual acts might successfully bring an as-applied challenge to Amendment 2, but so far as the record indicates, none of the respondents is such a person. See App. 4-5 (complaint describing each of the individual respondents as either "a gay man" or "a lesbian").¹¹⁷

Justice Scalia's placement of quotation marks around the word "orientation," in the first sentence appears to signify Justice Scalia's disbelief that gay or lesbian identity exists apart from sexual activity. Moreover, the final sentence of the quote clinches that assumption: a "gay man" or "a lesbian" by definition, engages in same-sex sexual conduct. Significantly, this elision allows Justice Scalia to reason about Amendment 2 and equate animosity or disfavor against gay persons as though it were approbation solely on the basis of sexual practices.¹¹⁸

Id.

115. *Id.*

116. *Id.* at 1631-37 (Scalia, J., dissenting); cf. Amar, *supra* note 108, at 228 (arguing that *Romer* is implicitly based on attainder clause concerns and makes a distinction between homosexual status and conduct).

117. *Romer*, 116 S. Ct. at 1633 (Scalia, J., dissenting) (citing to complaint describing each of the individual respondents as either 'a gay man' or 'a lesbian').

118. See, e.g., *id.* at 1633.

The Court's opinion contains grim, disapproving hints that Coloradans have been guilty of "animus" or "animosity" toward homosexuality, as though that had been established as Unamerican. Of course, it is our moral heritage that one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even "animus" toward such conduct. Surely that is the only sort of "animus" at issue here: moral disapproval of homosexual conduct, the same sort of moral disapproval that produced centuries-old criminal laws that we held constitutional in *Bowers*.

Id. Of course, Justice Scalia has accused the majority of making the exact opposite conclusion.

tutionality of Georgia's criminal sodomy statute,¹¹⁹ *Bowers v. Hardwick*.¹²⁰

If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact laws merely *disfavoring* homosexual conduct . . . "If the Court [in *Bowers*] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open . . . to conclude that state sponsored discrimination against the class is invidious. After all there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."¹²¹

Of course, this application of *Bowers* to *Romer* is only possible if gay identity is boiled down to sexual activity, of a rather limited type. *Bowers* literally held that criminalizing homosexual sodomy¹²² was not a violation of Due Process.¹²³ This is hardly a ringing endorsement of discrimination against lesbians and gay men. Not all sexually active gay people engage in this particular activity, while some non-gay persons do. If *Bowers* encompasses the limits of permissible state criminalization of sexual activity, and if men and women are defined by their criminalizable sexual behaviors (two big "ifs"), then some male-female couples might find themselves within Scalia's nomenclature as "gay" and some same-sex couples as "non-gay." This result is probably not what he had in mind.

Moreover, the state may not constitutionally criminalize male-female sodomy consistent with *Eisenstadt v. Baird*, and the Court's other privacy decisions.¹²⁴ As Justice Stevens

119. *Id.* at 1629 (Scalia, J., dissenting).

120. 478 U.S. 186 (1986).

121. *Romer*, 116 S. Ct. at 1631 (Scalia, J. dissenting) (citing *Padula v. Webster*, 822 F.2d 97, 103 (1987)).

122. *Bowers*, 478 U.S. at 188 n.1. Although the Georgia statute criminalized "any sexual act involving the sex organs of one person and the mouth or anus of another," the specific facts of *Bowers* involved consensual, male-male oral sex. *Id.*; see also PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS* 95-96 (1988) (partial interview with Michael Hardwick). The Court expressed no opinion on the constitutionality of the Georgia statute as applied to other acts. *Bowers*, 478 U.S. at 188 n.2.

123. *Bowers*, 478 U.S. at 196. The Court also refused to address any Equal Protection issues in the case. *Id.* at 188 n.2, 196 n.8.

124. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); see also, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Griswold v. Connecticut*, 381 U.S. 479 (1965); cf. *Bowers*, 478 U.S. at

noted in his *Bowers* dissent, the different treatment of same-sex and cross-sex sodomy gave rise to an equal protection problem.¹²⁵ *Bowers* does not resolve that problem which closely parallels the equal protection question the Court faced in *Romer*. Scalia cannot use *Bowers* as precedent for an issue that was not addressed in that case. Further, Scalia never specifies how far along the continuum of intimate, same-sex behavior *Bowers* is supposed to extend its prohibitory reach. Can the state now forbid two men from touching or kissing?¹²⁶ Is a man who hugs another man gay?

If lesbians and gay men have no identity apart from sex, they are indeed similar to the other groups identified by the dissent: murderers, polygamists, people who are cruel to animals,¹²⁷ or drug addicts, smokers, gun owners, or motorcyclists.¹²⁸ They are a collection of miscellaneous individuals united only by a common activity without any common, collective existence or identity. Whether or not it is correct to ascribe a gay identity to people living before the late nineteenth century, such as Michelangelo or Alexander the Great, who engaged in same-sex sexual activity,¹²⁹ it is a gross oversimplification to reduce all contemporary gay persons to their behavior in the bedroom.

The reduction of lesbians and gay men into persons who engage in particular sexual conduct appears in other aspects of Justice Scalia's opinion in *Romer*. Like Justice Brown in *Plessy*, Scalia's dissent is unsympathetic to allegations of unequal treatment under Amendment 2. In fact, he views the Colorado constitutional provision as simply restoring equality by prohibiting the grant of special rights to people "because of their homosexual conduct—that is, [Amendment 2] prohibits favored status for *homosexuality*."¹³⁰ His special rights/equality argument is flawed.

On a purely descriptive level, Justice Scalia misstates the effect of the Colorado law. Amendment 2 does not merely

216-18 (Stevens, J., dissenting) (discussing his view that *Griswold*, *Eisenstadt*, and *Carey* prohibit Georgia from enforcing its statute against heterosexual adults).

125. *Bowers*, 478 U.S. at 220 (Stevens, J., dissenting).

126. Professor Amar makes this same point. See Amar, *supra* note 108, at 232.

127. *Romer*, 116 S. Ct. at 1633 (Scalia, J. dissenting).

128. *Id.* at 1634 (Scalia, J. dissenting).

129. See *supra* note 69.

130. *Romer*, 116 S. Ct. at 1633 (Scalia, J. dissenting).

ban special rights and return Colorado law to neutrality. Each of the ordinances affected by the amendment—Aspen, Boulder, Denver, and the state Executive Order—barred discrimination on the basis of sexual orientation.¹³¹ Amendment 2 prohibited anti-discrimination provisions based on homosexual, lesbian, or bisexual orientation only.¹³² Thus, heterosexuals would have remained protected against sexual orientation discrimination under these ordinances whereas gay people were not. Moreover, non-gay persons could have politically pressed for protection because of their sexual orientation in those communities without existing regulations. Gay people would have had to call for a constitutional amendment. This is not even formal equality, but its opposite.

The only way in which this situation can appear neutral is if sexual orientation protections are irrelevant for non-gay persons, and thus functionally non-existent. These protections may be irrelevant to non-gay persons in one of two ways. First, there may be no need for protection if there is no discrimination on the basis of heterosexual sexual orientation.¹³³ Accordingly, we fail to notice the existence of non-gay persons' protections because they lie unused and dormant. Second, and more likely, our schema about lesbians and gay men makes sexual orientation a relevant characteristic for them, but not for non-gay persons. Non-gay sexual orientation is treated as the neutral baseline against which everything else is measured.¹³⁴ Thus, it recedes from consciousness.¹³⁵ More specifically, we do not have a separate schema for non-gay people; they are just "people" and not a group

131. *Id.* at 1624 (quoting *Evans v. Romer*, 854 P.2d 1270, 1284-85 (Colo. 1993)).

132. *Romer*, 116 S. Ct. at 1623 (citing COLO. CONST. art. II, § 30(b)).

133. *But see* Susan Ferriss & Erin McCormick, *When a Kiss Isn't Just a Kiss: Castro Bar Tosses Straight Smoochers*, S.F. EXAM., Mar. 9, 1997, at A1 (reporting that a gay bar owner ejected man and woman for kissing and the San Francisco Human Rights Commission ordered the gay bar to change anti-heterosexual kissing policy to comply with sexual orientation discrimination prohibitions).

134. Indeed, the word "heterosexual" did not come into the language until preceded by, and perhaps, in contradistinction to, "homosexual." David Halperin, *Sex Before Sexuality: Pederasty, Politics and Power in Classical Athens*, in *HIDDEN FROM HISTORY* 37, 38-41 (Martin Duberman et al. eds., 1989).

135. *See infra* note 490 and accompanying text (discussing the awkwardness of the expression, "openly non-gay" and the implications of that awkwardness).

characterized by their sexual behavior.¹³⁶ Thus, it is easy to forget or ignore the protections that exist for non-gay persons so that denying rights to lesbians and gay men does not at all create neutrality; rather, it subverts it.

One final illustration of the distortion in legal reasoning that occurs when the *Romer* dissent employs the flawed schema of lesbians and gay men as solely defined by sexual activity. In his discussion of what constitutes special treatment forbidden by Amendment 2, Justice Scalia writes, "it would prevent the State or any municipality from making death-benefit payments to the 'life-partner' of a homosexual when it does not make such payments to the long-time roommate of a nonhomosexual employee."¹³⁷ Again, note his use of quotation marks around "life-partner," evidencing his skepticism of the reality of a long-term, committed love relationship between two persons of the same sex. This is reinforced by his use of "long-time roommate of a nonhomosexual employee" as the equivalent of lesbian or gay male life partner. If one really believes that gay people can have life partners, the appropriate non-gay analogue is "spouse" or an unmarried, committed relationship equivalent. In modern, non-gay society there is a huge difference between roommates, even long-term, and spouses, domestic partners or mates.¹³⁸ There is no less of a difference in gay life. In a world where gay and lesbian couples share expenses, buy homes to-

136. Some segments of the gay community use the term "breeder" to refer to all non-gay persons. *E.g.*, Barbara Brotman, *Gay Or Straight, Readers Lust For 'Savage Love,'* CHI. TRIB., Nov. 21, 1996, Tempo Section at 1; Rob Morse, *We're Here, We're Having a Beer . . .*, S.F. EXAM., June 29, 1997, at A2; Rich Kane, *AOHELL, Can A Gay Man Find Love Online?*, O.C. WEEKLY (Orange County, Calif.), Apr. 4, 1997, at 8; Michael J. Ybarra, *Odd Man In: Businessman Gavin Newsom Is the Latest Addition to S.F.'s Board of Supervisors. His Biggest Selling Point? The Fact That He's a Straight White Male - A Relatively Rare Commodity in that City*, L.A. TIMES, Mar. 31, 1997, at E1. The rhetorical impact of that term illustrates the pejorative, misleading, and stigmatizing effect of a view that reduces people to one facet of their assumed sexual activity.

137. *Romer*, 116 S. Ct. at 1630 (Scalia, J., dissenting).

138. See generally Toni Cashnelli, *Uncertain Introductions*, GANNETT NEWS SERVICE, Dec. 13, 1994, at 8, available in 1994 WL 11245538; Joyce M. Rosenberg, *Greeting Cards Scramble to Keep Up*, COMMERCIAL APPEAL (Memphis, TN), Dec. 17, 1995, at F2. (describing the difficulty modern society has in attaching labels to unmarried couples' relationships); Steve Harvey, *Only in LA*, L.A. TIMES, April 4, 1995, at B2. (discussing the census bureau term POSSLQ, persons of opposite sex sharing living quarters, and the California personalized license plate X POSSLQ).

gether,¹³⁹ make wills naming their partners as beneficiaries,¹⁴⁰ raise families,¹⁴¹ and generally act substantially like heterosexual couples,¹⁴² describing those commitments as "long-time roommates" devalues and misrepresents them.

IV. TITLE VII

A. *Gay Identity As Gender-Atypicality*

In the context of Title VII litigation, the most common aspect of the lesbian and gay male schema is the attribution of cross-gender characteristics to gay people or to those perceived to be gay.¹⁴³ Significantly, this schema includes of people whom others perceive to be gay, since often only the atypical gender behavior triggers the schema and label of "homosexual."¹⁴⁴ Gay men are believed by non-gay males to be more womanly than heterosexual men;¹⁴⁵ lesbians are commonly seen as mannish and unfeminine.¹⁴⁶ Common me-

139. See, e.g., RICHARD ISAY, BEING HOMOSEXUAL: GAY MEN AND THEIR DEVELOPMENT 86 (1989); SUSAN E. JOHNSON, STAYING POWER: LONG-TERM LESBIAN COUPLES 49, 64-65, 95 (1990); DAVID MCWHIRTER & ANDREW MATTISON, THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP 82, 100, 220-21, 233 (1984).

140. See, e.g., MCWHIRTER & MATTISON, *supra* note 139, at 106, 222.

141. See, e.g., *id.* at 242-43; WARREN BLUMENFELD & DIANNE RAYMOND, LOOKING AT GAY AND LESBIAN LIFE 372 (1988); KARLA JAY & ALLEN YOUNG, THE GAY REPORT 134 (1978); JOHNSON, *supra* note 139, at 268-77.

142. Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 158 (1988) ("Many homosexual relationships are, except for the sex of the participants and the legal status of the unions, indistinguishable from heterosexual marriages."); MCWHIRTER & MATTISON, *supra* note 139, at 5; *cf.* *Braschi v. Stahl Assoc.*, 543 N.E.2d 49, 55 (N.Y. 1989) (discussing the statutory definition of family in rent-control ordinance which was expanded to include gay male couple because of the couple's dedication, caring and self-sacrifice).

143. E.g., Janet Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity*, 36 UCLA L. REV. 915, 948 (1989); Daniel Goleman, *Homophobia: Scientists Find Clues to Its Roots*, N.Y. TIMES, July 10, 1990, at C1.

144. E.g., *Strailey v. Happy Times Nursery Sch.*, 608 F.2d 327 (9th Cir. 1979) (consolidated on appeal with *DeSantis v. Pacific Tel. & Tel. Co.*); *Jantz v. Muci*, 759 F. Supp. 1543, 1545 (D. Kan. 1991) (non-gay teacher fired for "homosexual tendencies" because teacher reminded supervisor's secretary of her husband "whom she believed to be gay").

145. Stephen Morin & Ellen Garfinkle, *Male Homophobia*, 34 J. SOC. ISSUES 29, 40-41 (1978).

146. SUZANNE PHARR, HOMOPHOBIA: A WEAPON OF SEXISM 31 (1988); JAY & YOUNG, *supra* note 141, at 42-43 (girl who played boys sports labeled a "dyke"); *id.* at 54 (girl who wore work boots and work shirts, jeans to school labeled a

dia images reinforce this aspect of the schema,¹⁴⁷ and some statutes actually define sexual orientation as cross-gender self-identity or perceived self-identity.¹⁴⁸ While the schema is accurate for some lesbians and gay men,¹⁴⁹ more often than not, it is inaccurate.¹⁵⁰ Indeed, the surprise of some authorities at the extent to which the cross-gender aspect of the gay schema is counter-factual evinces its ingrained nature.¹⁵¹

From a jurisprudential perspective, this aspect of the lesbian and gay male schema encourages a conflation of sex, gender and sexual orientation.¹⁵² Judges may assume that a male plaintiff who exhibits gender atypical behavior is gay, even when he is not. Consequently, his Title VII claim may be transformed by judges from one based on gender to one based on sexual orientation. If sexual orientation discrimina-

"lez."). Some gay women also hold this view. MONIKA KEHOE, *LESBIANS OVER 60 SPEAK FOR THEMSELVES* 46-47 (1989) (discussing one woman's dislike of the term "lesbian" as connoting image of women trying to act like men).

147. HOWARD BROWN, *FAMILIAR FACES, HIDDEN LIVES: THE STORY OF HOMOSEXUAL MEN IN AMERICA TODAY* 42 (1976); VITO RUSSO, *THE CELLULOID CLOSET: HOMOSEXUALITY IN THE MOVIES* (rev. ed. 1994) (Chapter One is entitled "Who's a Sissy? — Homosexuality According to Tinseltown"). This view is sometimes internalized by gay people themselves. ISAY, *supra* note 139, at 49 (one adolescent did not believe he was really gay because the only media images of gay men portrayed them as effeminate).

148. MINN STAT. ANN. § 363.01 (West 1995) (sexual orientation defined, in part, as "having or perceived as having a self-image or identity not traditionally associated with ones biological maleness or femaleness").

149. LEWIS, *supra* note 27, at 39; MCWHIRTER & MATTISON, *supra* note 139, at 132.

150. *Id.* at 161-62; BLUMENFELD & RAYMOND, *supra* note 141, at 367.

151. Morin & Garfinkle, *supra* note 145, at 42-43 (relating amazement of some male therapists at the apparent masculinity of men in gay bars — more masculine than the therapists' own self-perceptions); MCWHIRTER & MATTISON, *supra* note 139, at 246 (detailing group of blue collar gay men, firemen, telephone linemen, construction workers, who drink beer and watch sports on TV, as though the existence of such men were an anomaly).

Of course, it may also be true that many lesbians and gay men who are open about their sexuality conform to this cross-gender schema. They have relatively less to lose by publicly sharing their homosexuality, as most non-gays will perceive them to be gay anyway. The ability of gender-conforming gay persons to "pass" and thereby avoid discrimination may encourage some of those individuals to remain "closeted." See Fajer, *supra* note 2, at 613-14. This tendency reinforces the schema and is one of its costs.

152. Other commentators have noticed this conflation. See e.g., Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); see generally, Ruth Colker, *Whores, Fags, Dumb-Ass Women, Surly Blacks, and Competent Heterosexual White Males: The Sexual and Racial Morality Underlying Anti-Discrimination Doctrine*, 7 YALE J.L. & FEMINISM 195 (1995).

tion in employment were illegal under federal law,¹⁵³ this transformation would have few practical consequences. However, since the courts¹⁵⁴ and the Equal Employment Opportunity Commission ("EEOC")¹⁵⁵ have specifically held that sexual orientation discrimination is beyond the scope of Title VII, the conflation leaves male¹⁵⁶ plaintiffs who exhibit gender atypical behavior remediless, and female plaintiffs with limited or uneven results, despite Supreme Court precedent.

A plurality of the United State Supreme Court recognized in *Price Waterhouse v. Hopkins*,¹⁵⁷ that an employer who requires traditional gender conformity for female employees perpetuates gender stereotypes in violation of Title VII. Price Waterhouse denied Ann Hopkins a promotion to an accounting partnership despite her recognized professional and business development abilities.¹⁵⁸ The employer proffered that the denial of partnership was attributable to her lack of interpersonal skills.¹⁵⁹ This criticism was expressed as a consequence of Ms. Hopkins' gender atypical (masculine) characteristics. Although males demonstrating equally or more abrasive characteristics or language were promoted to partners, the partnership negatively viewed those same qualities exhibited by her.¹⁶⁰ She was described as having "overcompensated for being a woman" and needing to enroll in a "course at charm school."¹⁶¹ Hopkins was advised by the partner charged with conveying the partner-

153. Some Congresspersons have introduced legislation to prohibit employment discrimination on the basis of sexual orientation. To date, they have not been successful. See e.g., H.R. REP. NO. 103-423, § 2(8) (1993).

154. See, e.g., *Dillon v. Frank*, 58 Empl. Prac. Dec. (CCH) ¶ 41,332 at 70, 106 (6th Cir. 1992); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329 (9th Cir. 1979); *Smith v. Liberty Mut. Ins. Co.*, 395 F. Supp. 1098, 1101 (N.D. Ga. 1975), *aff'd*, 569 F.2d 325 (5th Cir. 1978).

155. EEOC Dec. No. 76-67, EEOC Dec. (CCH) ¶ 6493, at 6462-63 (Mar. 2, 1976).

156. Gender atypical behavior in female plaintiffs does not always trigger the lesbian and gay man schema leading to this conflation. See *infra* notes 219-231 and accompanying text.

157. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (Brennan, J., plurality opinion).

158. *Price Waterhouse v. Hopkins*, 618 F. Supp. 1109, 1112-13 (D.D.C. 1985), *aff'd in part, rev'd in part*, 825 F.2d 458 (D.C. Cir. 1987), *aff'd in part, rev'd in part*, 490 U.S. 228 (1989).

159. *Id.* at 1113.

160. *Id.* at 1117 ("Ann has a clearly different personality . . . [but m]any male partners are worse than Ann (language and tough personality)").

161. *Price Waterhouse*, 825 F.2d at 463.

ship's decision to her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."¹⁶² The courts found that Ms. Hopkins was denied a partnership, in part, because Price Waterhouse did not believe that her behavior and characteristics were appropriate for gender.¹⁶³ To Price Waterhouse, a person's behavioral characteristics should be determined by his or her sex, despite the demands of the job. This is the double bind to which the Supreme Court plurality alluded: "An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible Catch-22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind."¹⁶⁴

The Court's focus on the double bind Ann Hopkins faced, obscured the core of the sex discrimination, the employer's insistence on gender conformity. The district court recognized this when it quoted *County of Washington v. Gunther*:¹⁶⁵ "In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes."¹⁶⁶ The provenance of this quote is telling. The Supreme Court first used it in *City of Los Angeles Department of Water and Power v. Manhart*¹⁶⁷ which prohibited the use of actuarially appropriate statistics showing that women live longer than men in determining employee benefits.¹⁶⁸ *Manhart* illustrates that even accurate generalizations based on sex can lead to discrimination against particular individuals who do not conform to those generalizations.¹⁶⁹ Accordingly, even if gender atypicality sometimes, or even often, corresponds to homosexuality, it cannot be as-

162. *Price Waterhouse*, 618 F. Supp. at 1117.

163. *Id.* at 1117-20 (partnership evaluation process affected by sex stereotyping). The D.C. Circuit Court and the Supreme Court affirmed the partnership's liability. The appellate courts disagreed on the appropriate evidentiary standard. *Id.*

164. *Price Waterhouse*, 490 U.S. at 251.

165. 452 U.S. 161 (1981).

166. *Price Waterhouse*, 618 F. Supp. at 1120 (quoting *Gunther*, 452 U.S. at 180).

167. *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978).

168. *Manhart*, 435 U.S. at 708.

169. *Id.*

sumed in the individual case, as the lesbian and gay male schema dictates. Gender atypicality and homosexuality are severable constructs; one does not implicate the other. When courts realize this fact, as in *Price Waterhouse*, they reach the correct result; when they do not, they err.

Moreover, the Court in *Price Waterhouse* explicitly stated that, with the exception of the Bona Fide Occupational Qualification (BFOQ) defense, "gender must be irrelevant to employment decisions."¹⁷⁰ This statement would seem to be a conclusive rejoinder to the concerns of Judge Williams, the dissenting judge on the circuit court panel:

The majority [of the D.C. Circuit] implicitly adopts a novel theory of liability under Title VII, but neither confronts the novelty of the theory nor gives it any intelligible bounds The theory is one of sexual stereotyping. An analysis grounding Title VII liability in such stereotypes may well be meritorious; but its articulation would require care Dismissal of a male employee because he routinely appeared for work in skirts and dresses would surely reflect a form of sexual stereotyping, but it would not, merely on that account, support Title VII liability. Nor, I suppose, does anyone contend that use of the feminine pronoun "she" to describe a female is a forbidden "evaluat[ion of] female candidates in terms of their sex."¹⁷¹

Judge Williams is correct; the logical corollary to *Price Waterhouse* is men in dresses. Indeed, this point may be seen as the *reductio ad absurdum*¹⁷² of the theory; the counterpart to outlawing the use of the pronoun "she." Why should men in dresses be beyond legal contemplation?¹⁷³ The picture of men in dresses raises the specter of the lesbian and gay male schema in a way that a "tough talking, somewhat masculine hard nosed [manager],"¹⁷⁴ like Ann Hopkins, did not. Thus, a man in a dress must necessarily be a homosexual, and his claim necessarily one based on sexual orientation, not gender. This conclusion would appear to be the reason that a

170. *Price Waterhouse*, 490 U.S. at 329-40.

171. *Price Waterhouse*, 825 F.2d at 473-74 (Williams, J., dissenting).

172. "In logic, the method of disproving an argument by showing that it leads to an absurd consequence." BLACK'S LAW DICTIONARY 1279 (6th ed. 1990).

173. The "You've got to be kidding" nature of the argument is reminiscent of much of the recent debate over same-sex marriage. See WILLIAM N. ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE* (1996).

174. *Price Waterhouse*, 825 F.2d at 463.

dismissal of a male employee could reflect gender stereotyping, and yet not be actionable.¹⁷⁵

The courts describe the plaintiffs in these cases in an enlightening manner. Although we do not have Ann Hopkins's physical description on the record, we know she was married.¹⁷⁶ We do, however, have a description of Dixie Adair, another successful female plaintiff and victim of sexual stereotyping who was denied a promotion for being abrasive, patronizing, and demanding.¹⁷⁷ Ms. Adair "presented a most matronly appearance" and "possess[ed] the very essence of womanhood,"¹⁷⁸ according to the trial court. Note the gender coded terminology. Not only is she the essence of womanhood, but she is matronly; thus fulfilling one of the central female gender roles, motherhood. Suggestively, the district court may be insulating Ms. Adair from any hint of lesbianism in a manner similar to the possible protection afforded to Ms. Hopkins's by her marriage.¹⁷⁹ The charge of homosexuality has the power to alter the courts' assessments of appropriate precedent.¹⁸⁰

For example, in *Smith v. Liberty Mutual Insurance Co.*,¹⁸¹ a male plaintiff raised claims for sex and race discrimination, and avoided any mention of sexual orientation causes of action.¹⁸² Nevertheless, the courts treated Smith's claim as

175. *Id.* at 473 (Williams, J., dissenting).

There is an alternative explanation for the different results of male and female plaintiffs' claims. That explanation relies on gender role differences to argue that asymmetrical treatment is appropriate. This article addresses the gender asymmetry argument. See *supra*, note 214 and accompanying text.

176. *Price Waterhouse*, 825 F.2d at 461. Ann Hopkins came to Price Waterhouse from another accounting firm in order to avoid an anti-nepotism rule. *Id.* Price Waterhouse was aware of her marriage because her husband's employment surfaced as a concern in her partnership decision. *Id.* at 461-62.

177. *Adair v. Beech Aircraft Corp.*, 782 F. Supp. 558, 562 (D. Kan. 1992).

178. *Id.* at 563. Compare the inferences flowing from Adair's description with *Goluszek v. Smith*, 687 F. Supp. 1452, 1453 (N.D. Ill. 1988), in which the plaintiff lost: "Anthony Goluszek has never been married nor has he lived anywhere but at his mother's home . . . [He] blushes easily and is abnormally sensitive to comments pertaining to sex."

179. Courts have often equated marriage with heterosexuality. *E.g.*, *Gibson v. Tanks, Inc.*, 930 F. Supp. 1107, 1109 (M.D. N.C. 1996). Of course, some lesbians are married, mothers, matronly, or any combination thereof. See, *e.g.*, *BROWN*, *supra* note 147, at 112; *ISAY*, *supra* note 139, at 139.

180. See, *e.g.*, *Valdes*, *supra* note 2, at 146-147.

181. 569 F.2d 325 (5th Cir. 1978).

182. *Id.* The author expresses his indebtedness to Professor Frank Valdes, see *supra* note 2 for his research into the facts and pleadings of *Smith*.

though it were based on sexual orientation.¹⁸³ Bennie Smith, an African-American male applied to be a mail clerk for Liberty Mutual Insurance Company ("Liberty Mutual").¹⁸⁴ He was rejected because the interviewing supervisor, Nathaniel Nash, found Smith to be "effeminate," and, therefore, unsuited for the job.¹⁸⁵ According to Nash, plaintiff was insufficiently "male."¹⁸⁶ The EEOC investigative report confirmed and reinforced the triggering effect of gender atypical characteristics and the homosexual schema by stating that Smith's "offensive" behaviors were "quite pronounced" and that he had "interests . . . not normally associated with males (sewing)."¹⁸⁷ In addition to illustrating the cross-gender trigger for the lesbian and gay male schema, the EEOC investigator's report evidences the well-documented tendency of people to magnify facts which confirm their schemas, and to downplay or ignore contradictory information.¹⁸⁸ Smith's actual employment application listed four hobbies: playing musical instruments, singing, dancing and sewing.¹⁸⁹ The only hobby significant enough for the EEOC investigator to note in his report was the last, sewing. This last hobby is the most gender identified with women.

Smith's sex discrimination claim alleged that, since the person hired as the mail clerk was a woman, the employer would have expected her to behave "effeminately" and have interests such as sewing.¹⁹⁰ Those characteristics would have been gender appropriate for a woman, but not for a man. Therefore, Smith's non-hiring was based on his sex. Analytically, Smith's claim may be denominated as "sex-plus;" sex, plus another neutral characteristic. It is conceptually identical to the successful legal strategy evident in *Phillips v. Mar-*

183. *Smith v. Liberty Mut. Ins. Co.*, 395 F. Supp. 1098 (N.D. Ga. 1975).

184. *Id.*

185. Valdes, *supra* note 2, at 139 n.396 (citing Brief for Appellee, Liberty Mutual Insurance Co., in *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325 (5th Cir. 1978) (No. 75-3230)).

186. *Id.* at 144.

187. *Id.* at 139 n.397 (citing Brief for Appellee, Liberty Mutual Insurance Co., in *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325 (5th Cir. 1978) (No. 75-3230)).

188. See, e.g., BROWER & NURIUS, *supra* note 10, at 54; Gottfried & Robins, *supra* note 10, at 33-39; CANTOR & KIHSTROM, *supra* note 10, at 1-44.

189. Valdes, *supra* note 2, at 139.

190. See Valdes, *supra* note 2, at 139 n.397 (citing Brief for Appellee, Liberty Mutual Ins. Co., in *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325 (5th Cir. 1978) (No. 75-3230)).

tin-Marietta.¹⁹¹ In *Phillips*, the Supreme Court said that an employer policy that prohibited the hiring of women with preschool-aged children and permitted the hiring of men with preschool-aged children violated Title VII.¹⁹² That policy reinforced traditional gender roles; women as child caretakers, men as wage earners.¹⁹³

Although plaintiffs have successfully challenged a range of employer policies as sex-plus discrimination,¹⁹⁴ exceptions exist which reflect the courts' unease with the correlation between Title VII protections and gender roles. In *Willingham v. Macon Telegraph Publishing Co.*,¹⁹⁵ the Fifth Circuit refused to extend sex-plus discrimination protection to a male plaintiff who was fired for having long hair, even though a female employee with long hair would not have been terminated.¹⁹⁶ The court stated that since hair length was neither an immutable characteristic, nor a protected right, it could not be the "plus" in Title VII analysis.¹⁹⁷ Despite *Willingham's* argument that the grooming code was based on stereotypes of masculinity and femininity, the court rejected its validity in invoking the protection of Title VII.¹⁹⁸ The majority did not view long hair on men as triggering the gay male schema.¹⁹⁹ Nevertheless, the dissent drew heavily from the district court's opinion that found a short, steep, slippery slope from *Willingham's* long hair to male employees in dresses, "lipstick, eyeshadow, and earrings."²⁰⁰ The latter circumstance was beyond the contemplation of Title VII. Once again, men in dresses constituted the conclusive rejoinder to

191. *Phillips v. Martin-Marietta*, 400 U.S. 542 (1971) (per curiam).

192. *Id.* at 544.

193. *Id.*

194. See, e.g., *Sprogis v. United Airlines, Inc.*, 444 F.2d 1194 (7th Cir.) (rejecting a no marriage rule for female, not male, flight attendants), *cert. denied*, 404 U.S. 991 (1971).

195. 507 F.2d 1084 (5th Cir. 1975).

196. *Willingham*, 507 F.2d at 1091-92.

197. *Id.*

198. *Id.* at 1089.

199. On the facts of *Willingham*, long hair on men apparently triggered the "hippie" schema. *Id.* at 1087; *Willingham*, 482 F.2d 535, 539 n.3 (5th Cir. 1973) (Simpson, J., dissenting) (original panel decision).

200. *Willingham*, 507 F.2d at 540 (Simpson, J., dissenting) (quoting *Willingham*, 352 F. Supp. 1018, 1020 (M.D. Ga. 1972)). Note the very different connotation of earrings on men in the early 1970's and the late 1990's. Although resistant to alteration, schemas do change over time.

a proffered legal argument.²⁰¹ Consequently, the court in *Willingham* stated that Title VII allowed employers to take "biological and cultural differences" into account.²⁰² The *Smith* court specified what these biological and cultural differences signified—homosexuality.²⁰³

Liberty Mutual successfully triggered the gay male schema in the trial and appellate courts by producing evidence of gender atypical behavior. Thus, the court transformed Smith's claim from gender role discrimination to homosexuality. Accordingly, both courts allowed Liberty Mutual to demand and enforce gender conformity in the workplace by denying Smith's Title VII suit on the basis of sexual orientation.²⁰⁴ The *Smith* court's reading of plaintiff's claim as one of sexual orientation discrimination, rather than gender discrimination, both misses the analytical mark and enshrines the gender atypical behavior aspect of the lesbian and gay male schema within Title VII doctrine.²⁰⁵ Smith, himself, argued for preventing gender atypicality from triggering the gay male schema in order to underscore the gendered nature of his discrimination claim. His brief stated that he was a happily married, heterosexual male, and was not "demanding that an employer accept [an] unconventional life style or mores."²⁰⁶ Smith attempted to spotlight the fact that the employer's "refusal to hire him was not based on a

201. Compare *Willingham*, 507 F.2d at 540, with *Price Waterhouse*, 825 F.2d at 474 (Williams, J., dissenting).

202. *Willingham*, 352 F. Supp. at 1021.

203. See *Smith*, 569 F.2d at 325-27.

204. *Smith*, 395 F. Supp. at 1101; 569 F.2d. at 327 n.1; accord *Willingham*, 507 F.2d at 1092 (not sex-plus because "both sexes screened with respect to a neutral fact, i.e., grooming in accordance with generally accepted standards of dress and appearance."). There have been other successful employer claims to enforce workplace gender appropriateness. See e.g., *Strailey v. Happy Times Nursery Sch.*, (consolidated under the name *DeSantis v. Pacific Tel. & Tel. Co.*), 608 F.2d. 327 (9th Cir. 1979) (plaintiff teacher fired for wearing gender atypical earring to school); *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d. 1084 (5th Cir. 1975) (gender atypical long hair on male inappropriate, employer may legitimately be concerned about image presented to customers).

205. It also helps create what Professor Valdes calls "the sexual orientation loophole." Valdes, *supra* note 2, at 146-47.

206. *Id.* at 146 nn.430, 432 (citing Brief for Appellant, Smith, in *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325 (5th Cir. 1978) (No. 75-3230)).

Note the use of marriage to buttress a conclusion of heterosexuality. See *supra* note 176 and accompanying text. Note also the association of homosexuality with abnormal behavior and the foisting of that abnormality on an unwilling target. See *supra* notes 94, 96 and accompanying text.

determination that plaintiff was in fact homosexual, but rather the subjective determination that he possessed personal traits that Liberty Mutual associated by stereotype with the female gender.²⁰⁷

Nevertheless, once Liberty Mutual triggered the gay male schema for the court, this difference was inconsequential.²⁰⁸ The district court misconstrued Smith's claim as based on sexual orientation, when it was not.²⁰⁹ Moreover, in discussing Smith's sex-plus cause of action, the court evaluated Smith's claim within the reasoning of the Supreme Court in *Price Waterhouse*:

Plaintiff points out that defendant employed a female black applicant for the position sought by plaintiff. He thus argues that the defendant accepted an employee presumably displaying effeminate characteristics resulting in plaintiff's having been discriminated against because he was male The Court views the situation differently. It appears that the defendant concluded that the plaintiff, a male, displayed characteristics inappropriate to his sex, the counterpart being a female applicant displaying inappropriate masculine attributes.²¹⁰

Smith and other cases involving gender atypicality in men²¹¹ should be logically overruled by analogy to *Price Waterhouse*.²¹² That they are not²¹³ says something significant

207. Valdes, *supra* note 2, at 146.

208. Of course, if Smith's assumed homosexuality, and not merely gender atypicality, really was the cause of his non-hiring, then Title VII would not literally apply since there would be no discrimination based on sex. *Accord, e.g., St. Mary's Honor Ctr. v. Hicks*, 505 U.S. 502, 517 (1993) (explaining burdens of proof in Title VII cases).

209. *Smith*, 395 F. Supp. at 1099.

210. *Id.* The Fifth Circuit's analysis is similar. *See Smith*, 569 F.2d at 327.

211. *E.g., Straley v. Happy Times Nursery Sch.*, 608 F.2d. 327 (9th Cir. 1979) (plaintiff teacher fired for wearing gender atypical earring to school).

212. Some commentators have so suggested. *See, e.g., I. Bennett Capers, Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1159 (1991); Samuel Marcossan, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L. J. 1, 24-25 (1992); David R. Wade, *Women Denied Partnerships Revisited: A Response to Professors Madek and O'Brien*, 8 HOFSTRA LAB. L.J. 81, 120-24 (1990). Others have rejected that conclusion. *See, e.g., Karl Klare, Power/Dressing: Regulation of Employee Appearance*, 25 NEW ENG. L. REV. 1395, 1420 (1992); Valdes, *supra* note 2, at 161.

213. *See, e.g., Bedker v. Dominos Pizza*, 62 Fair Empl. Prac. Cases (BNA) 1848, 1850 (Mich. Ct. App. 1992) (relying on *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d. 1084 (5th Cir. 1975), for the proposition that grooming codes do not significantly affect employment opportunities); *Lockhart v. Louisiana-Pacific Corp.*, 53 Fair Empl. Prac. Cases (BNA) 1412, 1413 (Or. Ct. App. 1990)

about the persistence of the lesbian and gay male schema to distort legal doctrine.

One might argue that the asymmetrical treatment of male and female plaintiffs' cases is both correct and required by the difference in male and female gender roles. According to this view, Price Waterhouse's insistence on traditional female gender behavior locked Ann Hopkins into an inferior and subordinate status. Conversely, Liberty Mutual's requirement of traditional male gender behavior did not disadvantage Bennie Smith in the same way, since the male gender role occupies a superior power position.²¹⁴ While insistence on formal symmetry can sometimes mask relevant differences and lead to unjust results,²¹⁵ that theory is of little assistance in this context.

Although the "double bind" language²¹⁶ of *Price Waterhouse* might support a female gender-specific asymmetrical approach, other aspects of the plurality's opinion contradict it. The opinion focused on the individual nature of Ms. Hopkins's claim.²¹⁷ Forced conformity to group norms for behavior—even commonly accepted ones—still negatively affect individuals. Bennie Smith was just as surely precluded from employment as Ann Hopkins was, and for the same reason—their employers' insistence that they each conform their gender behavior to that appropriate to their biological sex. Further, men as well as women are protected by Title VII. Both the Court and the EEOC have been careful to give members of subordinated and majority groups equal access to Title VII relief.²¹⁸

(upholding employer rule prohibiting facial jewelry for men, but not for women).

214. See generally, Carolyn Grose, *Same-Sex Sexual Harassment: Subverting the Heterosexist Paradigm of Title VII*, 7 YALE J.L. & FEMINISM 375, 380-85 (1995) (making a similar gender difference argument in the context of same-sex sexual harassment).

215. See, e.g., *Pace v. Alabama*, 106 U.S. 583, 585 (1883); *Naim v. Naim*, 87 S.E.2d 749, 754 (1955); *McLaughlin v. State*, 153 So.2d 1, 2 (Fla 1963), *rev'd*, *McLaughlin v. Florida*, 379 U.S. 184 (1964).

216. *Price Waterhouse*, 490 U.S. at 251.

217. See *supra* notes 165-170 and accompanying text.

218. See, e.g., *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)) (explaining that men can be victims of sexual harassment as well as its perpetrators); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995); *Barnes v. Costle*, 561 F.2d 897, 990 n.55 (D.C. Cir. 1977); 2 EEOC Compl. Man. (BNA) § 615.2(b)(1) (1987); see also, e.g., *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (white males entitled to Title VII relief); McDon-

Although it should not preclude Bennie Smith's recovery, gender role asymmetry does affect the lesbian and gay male schema and legal doctrine. The distorting aspect of the lesbian and gay male schema does not always operate in a purely parallel manner when women are involved in the workplace. Certain types of gender atypical behavior in women may be acceptable, or even expected, in some contexts. Thus, a woman displaying them is perceived to be within "normal" gender appropriate boundaries.²¹⁹ Employers and judges tend not to make an equation with lesbian identity, and formulate appropriate legal analogies and doctrine. But because many workplaces and careers are traditionally and predominantly male, women may be under pressure to utilize more masculine attributes in these settings. Women may be advised that in order to be hired, or be taken seriously in business, they must not dress or act overtly feminine—not wear too much jewelry, skirts too short, heels too high, etc.²²⁰ At least for some jobs, therefore, a woman with some traditionally masculine attributes may be preferred.²²¹

Similarly, the choice of some traditionally masculine careers may be perceived as rational—particularly if they are high status jobs such as an accountant, a lawyer, or a business executive. However, cross-gender job choice by males, or by women entering more blue-collar fields, implicates the

ald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

219. Cf. *Fudge v. Penthouse Int'l*, 840 F.2d 1012, 1016 (1st Cir. 1988) (explaining that the word "amazon" is not libelous when referring to schoolgirls; finding that there is a sufficiently wide spectrum of gender appropriate behavior for schoolgirls).

220. See, e.g., Sandra Forsythe, *Effect of Applicant's Clothing on Interviewers' Decision to Hire*, 20 J. APPLIED SOC. PSYCHOL. 1579 (1990) (suggesting that female applicants in more masculine attire are perceived to be more business-like, to possess more management skills, and therefore, to be hired); Richard Lacayo, *A Hard Nose and a Short Skirt: Two Cases Raise Questions About a Woman's On-The-Job Style*, TIME, Nov. 14, 1988, at 98 (describing case of Brenda Taylor, Assistant State Attorney, reprimanded for looking like a "bimbo" by wearing short skirts, spike heels, designer blouses); Ellen Goodman, *O.J. Prosecutor Hears Critics Put Her Style on Trial*, FRESNO BEE, Oct. 21, 1994, at B7 (describing decision by Marcia Clark, O.J. Simpson prosecutor to appear less masculine by changing her hairstyle and dress.); WORKING GIRL (20th Century-Fox 1988) (advice given to the protagonist, a female secretary, on the first day of work for her new female boss, that overtly feminine dress is inconsistent with the professional tenor of her position).

221. Recall the Supreme Court's description of the double bind Ann Hopkins faced at the accounting firm, Price Waterhouse. *Price Waterhouse*, 490 U.S. at 251.

lesbian and gay male schema.²²² Contrast the common perception of a woman who seeks to be a corporate securities attorney with one who wants to be a bulldozer driver²²³—or a man who desires to be a nurse or receptionist. Social psychology research bears out this insight. One study of this issue found that men entering traditional female professions were asked about their “masculinity” (viz., sexual orientation); women were not.²²⁴ Tellingly, by using the noun “masculinity” to cover references to homosexuality, the authors of the study also equated gender atypicality with the lesbian and gay male schema.²²⁵ Thus, the example illustrates the persistence of the schema, even among researchers who study the societal aspects of gender roles.

The difference in treatment between gender atypical men and women may be partially attributed to the perceived status gains or losses associated with taking traditional male or female jobs.²²⁶ A man who takes a traditionally female role, by becoming a secretary, for instance, loses social status. A woman however, gains status when she takes a traditionally male career, such as a lawyer.²²⁷ The man's choice may be perceived as “peculiar,”²²⁸ the woman's as natural.²²⁹ The

222. Accord Richard Levenson, *Sex Discrimination in Employment Practices: An Experiment with Unconventional Job Inquiries*, in *WOMEN AND WORK: PROBLEMS AND PERSPECTIVES* 54, 61 (Rachel Kahn-Hut et al. eds., 1982).

223. Compare the courts' sympathies to the female plaintiffs in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (accountant), with *Valdes v. Lumbermen's Mutual Casualty Co.*, 507 F. Supp. 10 (S.D. Fla. 1980) (lower level warehouse employee).

224. Levenson, *supra* note 222, at 61.

225. “Interestingly, several male . . . callers were questioned about their ‘masculinity’ (e.g., ‘Are you a queer?’).” Levenson, *supra* note 222, at 61.

226. Lisa A. Serbin & Carol H. Sprafkin, *A Developmental Approach: Sexuality from Infancy Through Adolescence*, in *THEORIES OF HUMAN SEXUALITY* 163, 177 (James H. Geer & William T. O'Donohue eds., 1987). “Girls who exhibit cross-sex-typed behavior receive far less censure than boys, possibly because of the higher status that male sex roles have in our culture . . .” *Id.*

227. Fajer, *supra* note 2, at 628. Some have argued that men losing status by taking female roles (and vice versa) is the key to homophobia. See, e.g., Valdes, *supra* note 2, at 258-59; Nan Hunter, *Marriage Law and Gender: A Feminist Inquiry*, 1 L. & SEXUALITY 9 (1991) (arguing that opposition to same-sex marriage stresses the fact that it would undermine traditional male dominant/female passive roles); see also Nikolaus Benke, *Women and the Courts: An Old Thorn in Men's Sides*, 3 MICH. J. GENDER & L. 195, 247 (1995) (stating that ancient Roman law abridged the litigation rights of the penetrated male in homosexual male intercourse just as if he were a woman).

228. Levenson, *supra* note 222, at 61.

229. Of course, it was not always so. For a famous example of a woman's

available alternative explanation that women are seeking increased status may explain why courts have been more readily able to recognize discrimination against women on the basis of gender atypicality as violating Title VII, but have been unable to make a parallel conclusion with men.

Cognitive psychologists have found that people seize upon even tenuous theories to rationalize inexplicable events or behavior,²³⁰ and that schemas often fill this need for order and rationality.²³¹ Consequently, employers and judges may call upon the lesbian and gay male schema when increased status or other acceptable reasons cannot explain gender atypical behavior.²³² Accordingly, when masculine women who work in high status careers appear before the courts as plaintiffs, they often do not trigger the lesbian schema. Once we factor in the lesbian and gay male schema, the contrast between the outcomes in *Price Waterhouse* and *Smith* appears less confusing.

B. *Sexual Harassment*

Although it is well established that Title VII prohibits sexual harassment in the workplace perpetrated by men against women²³³ and by women against men,²³⁴ once again the presence of lesbians or gay men often derails proper judicial analysis. Courts are split as to whether same-sex sexual harassment violates Title VII, even though the two claims are more alike than different.

choice to enter the legal profession viewed as unnatural, *see* *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring).

230. *See* ROBERT H. LAUER & WARRREN H. HANDEL, *SOCIAL PSYCHOLOGY: THE THEORY AND APPLICATION OF SYMBOLIC INTERACTIONISM* 5-6 (2d ed. 1983).

231. BROWER & NURIUS, *supra* note 10, at 13-14.

232. Remember the rhetorical question, "Is a man who hugs another man gay?," asked in the context of Justice Scalia's *Romer* dissent. *See supra* note 126 and accompanying text. One might have replied, not if he is a football player congratulating a teammate after a touchdown, or other such example. That response employs the same search for alternative explanations to make a man hugging another man fit one's definition of rationality. In fact, the male-male hug may have nothing to do with his being gay or a football player – or the man may be both. *See, e.g.*, DAVID KOPAY & PERRY DEANE YOUNG, *THE DAVID KOPAY STORY* (1977) (autobiography of a gay NFL player).

233. *E.g.*, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 73 (1986).

234. *E.g.*, *Anderson v. S.U.N.Y. Health Science Ctr.*, 836 F. Supp. 625 (N.D.N.Y. 1993) (permitting Title VII claim, but rejecting liability due to insufficient evidence); *cf. Garinella v. General Elec.*, 833 F. Supp. 617 (W.D. Ky. 1993) (state anti-discrimination statute).

Courts traditionally divide sexual harassment into two types: quid pro quo and hostile environment.²³⁵ The former is a request for sexual favors, which is directly linked to an economic or other tangible benefit.²³⁶ The latter describes a workplace where employees are subject to unwanted sexual attention or discriminatory intimidation, ridicule, and insult,²³⁷ without a direct connection to employment benefits. Although the elements for the two causes of action differ slightly,²³⁸ the difference does not affect our analysis. Both are based on subjecting members of one sex to conduct or behavior (and thus terms and conditions of employment) not applicable to members of the other sex.²³⁹ Both are created by unwanted sexual advances or other verbal or physical activity of a sexual nature.²⁴⁰

In same-sex sexual harassment situations, however, examining the perpetrator's motivations more usefully clarifies the analysis. Some sexual harassment appears to be motivated by attraction or desire for the harassment victim, others by hostility or antipathy toward the individual.²⁴¹ Thus, requests for sexual favors, dates and similar physical advances would fall into the attraction-based sexual harassment category.²⁴² Sexual innuendoes, taunts, unwanted sexual attention, or other conduct of a sexual nature that is so "sufficiently severe or pervasive to alter the conditions of the victims employment" and which fill the workplace with "discriminatory intimidation, ridicule and insult,"²⁴³ constitute hostility-based sexual harassment.²⁴⁴ The distinction between attraction- and hostility-based sexual harassment re-

235. *Meritor*, 477 U.S. at 64-65.

236. *Id.*

237. *Id.* at 65.

238. *Prescott v. Independent Life and Accident Ins. Co.*, 878 F. Supp. at 1549.

239. *Meritor*, 477 U.S. at 64-65.

240. *Id.* at 65.

241. This division is not meant to suggest that the two categories are mutually exclusive, or that sexual advances ostensibly motivated by desire cannot evidence hostility towards women in the workplace. See, e.g., CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 209-10 (1979).

242. See, e.g., *Meritor*, 477 U.S. 60.

243. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 65 (1986)).

244. See, e.g., *id.*

mains relatively unnoticed by the courts.²⁴⁵ Further, courts have not traditionally required plaintiffs to show motive, nor does this article suggest that they should. However, motivation may serve as an analytical tool to understand how the lesbian and gay male schema affects same-sex sexual harassment cases.

1. *The Mechanics of Sexual Harassment*

Attraction-based sexual harassment cases present some significant analytic differences from the archetypal Title VII disparate treatment case.²⁴⁶ In the latter situation, as in typical hostility-based sexual harassment, an employer or his agent treats an individual or class of persons differently because of their sex²⁴⁷ or race,²⁴⁸ as examples. Thus, in *Rosenfeld v. Southern Pacific*,²⁴⁹ Leah Rosenfeld and all other women were affected equally—none was permitted to be agent-telegraphers.²⁵⁰ However, in a typical attraction-based, sexual harassment suit, the harasser does not target all women (or men), but only the few he (or she) finds sexually appealing.

245. *But see* Tietgen v. Brown's Westminster Motors, Inc., 921 F. Supp. 1495, 1500-01 (E.D. Va. 1996).

246. These differences have prompted one commentator to call for the introduction of a separate tort of sexual harassment. Ellen Frankel Paul, *Sexual Harassment As Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333 (1990).

247. *E.g.*, *Rosenfeld v. Southern Pac.*, 444 F.2d 1219 (9th Cir. 1971) (exclusion of women from job as agent-telegrapher); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983) (insurance plan disfavored married male employees over married female employees).

248. *E.g.*, *Texas Dep't of Comm. Affairs v. Burdine*, 450 U.S. 248 (1981) (white males entitled to Title VII relief); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (white employees disciplined more harshly than black employees).

249. 444 F.2d 1219 (9th Cir. 1971)

250. *Rosenfeld*, 444 F.2d at 1219.

Courts have recognized a second type of Title VII lawsuit, Disparate Impact, a neutral policy which disproportionately affects a protected class. *See, e.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (high school diploma requirement disproportionately affected black employees); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (height and weight requirement disproportionately affected women).

Some commentators have argued that sexual orientation discrimination might disproportionately affect men, thus violating Title VII. *E.g.*, Charles Calleros, *The Meaning of 'Sex': Homosexual and Bisexual Harassment Under Title VII*, 20 VT. L. REV. 55, 59-60 (1995). *But see* *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d at 333-34 (Sneed, J., dissenting). This article does not.

Early on, some judges seized upon the difference between the two claims in order to reject liability.²⁵¹ Other courts reasoned that sexual harassment was not sex discrimination since the real reason for the disparate treatment was plaintiff's refusal to have a sexual relationship and not the employer's dislike of women.²⁵² Later courts rejected both proposed distinctions. A supervisor, who demands sexual favors from a female because he is attracted to her, does so, if heterosexual, because only members of her sex have the potential to be found sexually appealing to him. Accordingly, but for her sex, she would not be treated differently.²⁵³

In contrast, anti-female, hostility-based sexual harassment is jurisprudentially more like other forms of disparate treatment under Title VII. Harassment can take many forms, including conduct without any explicitly sexual content:²⁵⁴ unwanted physical contact of a sexual nature (e.g., groping, rubbing, intentional bumping, staring);²⁵⁵ insults; ridicule and other verbal abuse referring to gender (e.g., "bitch, slut, stupid woman");²⁵⁶ and sex-based refusal to cooperate or hard-timing (e.g., not trading shifts, not sharing workload).²⁵⁷ Naturally, these types of behaviors are neither exhaustive nor mutually exclusive. Any given situation can have many different examples of harassing behavior.²⁵⁸ The key in each of these situations, is that an individual was targeted because she was female. Unwanted touching and verbal harassment of women in the workplace undermines the

251. *E.g.*, *Vinson v. Taylor*, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., dissenting, *aff'd on other grounds sub nom.*, *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57 (1986); *accord* Paul, *supra* note 246, at 349-50).

252. *Barnes v. Train*, 13 Fair Empl. Prac. Cas. (BNA), 123, 124 (D. D.C. 1974), *rev'd sub nom.*, *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

253. *Harris v. Forklift Sys.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring) ("The critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."); *Bundy v. Jackson*, 641 F.2d 934, 942 (D.C. Cir. 1981).

254. *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988); *Andrews v. Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990).

255. *E.g.*, *Agugliaro v. Brooks Bros.*, 927 F. Supp. 741 (S.D.N.Y. 1996).

256. *Jensen v. Evalett Taconite Co.*, 824 F. Supp. 847, 880, 883 (D. Minn. 1993); *Winsor v. Hinckley Dodge, Inc.*, 79 F.3d 996 (10th Cir. 1996).

257. *E.g.*, *Andrews*, 895 F.2d at 1473 (files taken and/or defaced, not given certain assignments, equipment sabotaged); *Porta v. Rollins Envtl. Serv., Inc.*, 654 F. Supp. 1275, 1279 (D. N.J. 1987).

258. *See, e.g.*, *Andrews*, 895 F.2d 1469 (sexual comments and innuendo, pornography, destruction of office equipment, hiding of files).

woman's role as worker and can be traced to a view by men that women are sexual playthings.²⁵⁹ Comments like "Whore, what's the amount?" to a female bookkeeper or "Women are only good for fucking"²⁶⁰ are but blatant illustrations of the denigration of women because of sex.²⁶¹ This type of treatment of women signals to them that they are not equals in the workplace with men.²⁶² Thus, it is related to hard-timing or non-sexual disparate treatment of female workers.

In *Andrews v. Philadelphia*,²⁶³ female police officers worked in an environment that did not accept peace officer as a gender-appropriate career choice for women.²⁶⁴ Plaintiffs were told both verbally, and through male co-workers' conduct, that they did not belong in the department.²⁶⁵ Hostility-based sexual harassment is, thus, also parallel to classic examples of racial discrimination under Title VII.²⁶⁶

Even in hostility-based sexual harassment, a perpetrator

259. See LIN FARLEY, *SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB* 13 (1978); Accord JUDITH P. BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 19 (1990) (discussing the identification of women with sex).

260. *EEOC v. A. Sam & Sons Produce Co.*, 872 F. Supp. 29, 34-36 (W.D.N.Y. 1994).

261. FARLEY, *supra* note 259, at 14-15; BUTLER, *supra* note 259, at 19; MACKINNON, *supra* note 241, at 209-10.

262. MACKINNON, *supra* note 241, at 235.

263. 895 F.2d 1469 (3d Cir. 1990).

264. *Id.* at 1472-78 (discussing treatment of two female officers by male co-workers).

265. *Id.* at 1475 (files missing, after plaintiff requested a transfer, male superior officer said, "You women don't know what you want. Why don't you stay in one place like a man?," and superior confronted female officer's complaint of equipment sabotage with, "You know you're no spring chicken. You have to expect this working with the guys."). The court found that supervisory personnel's treatment of the conduct with a "boys will be boys" attitude signified culpable acquiescence to the sexual harassment. *Id.* at 1479. In contrast, in cases involving lesbian and gay men, the courts have treated a similar cavalier supervisory attitude as the appropriate response. Accord *Quick v. Donaldson Co.*, 895 F. Supp. 1288, 1296 (S.D. Iowa 1995) (court dismisses unwanted touching of plaintiffs' genitals as "juvenile mischief and immature behavior"), *rev'd*, 90 F.3d 1372 (8th Cir. 1996); See, e.g., *Goluszek v. Smith*, 697 F. Supp. 1452, 1454-56 (N.D. Ill. 1988); *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp. 822, 828 (D. Md. 1994) (plaintiff and offending supervisor told to "stop acting like little boys."); But cf. *Nabozny v. Podlesney*, 92 F.3d 446 (7th Cir. 1996) (openly gay student told by school officials to expect and accept harassment was not given an appropriate response).

266. Compare *Andrews v. Philadelphia*, 895 F.2d 1469, 1475 (3d Cir. 1990). (female police officers harassed), with *Snell v. Suffolk County*, 782 F.2d 1094 (2d Cir. 1986) (African-American and Hispanic correctional officers harassed).

need not direct his or her attention to all employees of one sex at work, but only to a particular individual because of that person's sex. In *Harris v. Forklift Systems*,²⁶⁷ the Supreme Court treated as sexual harassment, a workplace full of sexual innuendo, apparently not intended as evidence of sexual attraction for Ms. Harris, but demonstrating hostility toward her and other women.²⁶⁸ The salient feature is that she was exposed to this treatment because she was a woman.²⁶⁹ Moreover, a pervasively sexualized workplace, in which pornography, comments, horseplay and other physical activity of a sexual nature abound, can also create a hostile environment—with or without specifically targeting an individual.²⁷⁰ Thus, analytically, sexual harassment need not be directed at all members of a particular sex, and need not be based on sexual attraction or desire, but may be based on hostility or intimidation targeted at an individual because of gender.

2. *The Role of Sexual Attraction and Sexuality*

Sexual harassment cases may involve two different behaviors, attraction and hostility, with sexual orientation playing a different role in each of these situations. In attraction-based sexual harassment, sexual desire serves to identify the potential class of victims: a non-gay supervisor targets a member of the opposite sex because of that individual's sex; a gay man or lesbian selects a member of the same sex for the same reason.²⁷¹ Sexual orientation is the key to the but for causation.²⁷² In hostility-based, same-sex sexual harassment, presumably non-gay persons target a lesbian or gay male (or assumed lesbian or gay male) for sexual conduct, innuendo and denigration of that individual ostensibly because

267. 510 U.S. 17 (1993).

268. *Harris*, 510 U.S. at 19.

269. *Id.* at 25 (Ginsburg, J., concurring).

270. *See generally, e.g.,* *Andrews v. Philadelphia*, 895 F.2d 1469 (3d Cir. 1990) (pornographic magazines and devices left on female police officer's desk, sexual innuendoes and comments); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991) (many instances of pornographic photos, etc. and sexual comments at shipyards).

271. *See, e.g.,* *EEOC v. Waldenbook Co.*, 885 F. Supp. 1100 (M.D. Tenn. 1995); *Marrero-Rivera v. Dept. of Justice*, 800 F. Supp. 1024 (D. P.R. 1992); *Joyner v. AAA Cooper Transp.*, 597 F. Supp. 537 (M.D. Ala. 1983).

272. *Waag v. Thomas Pontiac Buick, Inc.*, 930 F. Supp. 393, 401-02 (D. Minn. 1996).

of that individual's sexuality.²⁷³ In attraction-based cases, the parallels to cross-sex sexual harassment cases are straightforward; in hostility-based cases, the analysis is more refined.²⁷⁴

a. Attraction-Based Sexual Harassment

The first category, attraction-based, same-sex sexual harassment, fits neatly within the prototypical cross-sex, attraction-based case. If a male harasses a female by seeking unreciprocated sexual favors, that female employee is being treated differently because of her sex.²⁷⁵ By parity of reasoning, a gay supervisor who gives unwanted sexual attention to an employee of the same sex is imposing a discriminatory term or condition of employment because of that individual's sex. Neither the sex of the employer/employee pair, nor the sexual orientation of the employee should be relevant to the analysis.²⁷⁶

273. See, e.g., *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988); *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446 (5th Cir. 1994); *Dillon v. Frank*, 58 Empl. Prac. Dec. (CCH) ¶ 41,332 at 70,102 (6th Cir. 1992). Although a gay supervisor or co-worker may hostilely harass a non-gay employee because of that employee's sexuality, that situation is far from typical. *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138, 142 (4th Cir. 1996), may illustrate that situation, although the court treated it as though it were typical, attraction-based sexual harassment.

274. The more complex nature of same-sex, hostility-based sexual harassment has prompted some courts to limit their holdings to attraction-based claims. E.g., *Fredette v. FVP Mgt. Assoc., Inc.*, 112 F.3d 1503 (11th Cir. 1997); *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443, 448 (6th Cir. 1997).

275. See, e.g., *Harris v. Forklift Sys.*, 510 U.S. 17, 25-26 (1993) (Ginsburg, J., concurring).

276. E.g., *Gerd v. United Parcel Serv., Inc.*, 934 F. Supp. 357, 361 (D. Colo. 1996); *Tanner v. Prima Donna Resorts, Inc.*, 919 F. Supp. 351, 355 (D. Nev. 1996).

Although the author did not discover a case in which an agent of the employer demanded sexual favors from an employee of the opposite sex who he or she (presumably) erroneously thought was heterosexual—and was therefore sexually unavailable to the harasser, analytically this should not matter. The focus of Title VII doctrine is whether the harasser treats a member of one sex differently from members of the other sex. EEOC Compl. Man. (BNA) § 615.2(b)(3) (1987); see generally, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68-69 (1986) (stating that the question is whether the sexual advances were unwelcome, not whether they were voluntary, or whether the dress or behavior of the victim dictated such a finding). But see *supra* note 308 and accompanying text (discussing the significance to the Fourth Circuit that a gay harasser targeted a non-gay employee).

Moreover, some courts have also reasoned that in same-sex sexual harassment the plaintiff must plead and prove that the harasser is gay or lesbian.

Some courts have recognized this congruence and have found same-sex sexual harassment actionable under Title VII.²⁷⁷ Most of those cases have been attraction-based sexual harassment.²⁷⁸ They illustrate the schema of a sexual harassment matter—unwanted sexual attention in the workplace. Same-sex, attraction-based, sexual harassment most closely resembles the prototype of cross-sex sexual harassment. It is unsurprising that courts are able to incorporate unwanted homosexual attention into the paradigmatic heterosexual, attraction-based, sexual harassment prototype found in Title VII cases.²⁷⁹ The key component of that prototype is that, but for an individual's sex, he or she would not have been a target of harassment because sexual attraction is limited to that sex.²⁸⁰ Prototype matching, or representative-

E.g., *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191 (4th Cir. 1996). Superficially, this requirement appears reasonable. However, it evidences a misunderstanding of sexual harassment doctrine and the analogy to cross-sex sexual harassment. *See infra* notes 300-311, 401-415 and accompanying text.

277. *E.g.*, *EEOC v. Waldenbook Co.*, 885 F. Supp. 1100, 1102-04 (M.D. Tenn. 1995) (discussing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986), and reasoning by analogy to it.); *Marrero-Rivera v. Department of Justice*, 800 F. Supp. 1024 (D. P.R. 1992); *Joyner v. AAA Cooper Transp.*, 597 F. Supp. 537 (M.D. Ala. 1983).

278. *E.g.*, *Fredette*, 112 F.3d at 1503; *Yeary*, 107 F.3d at 443. Those courts have clarified that their holdings only extended to attraction-based sexual harassment claims. *Id.* at 448; *Fredette*, 112 F.3d at 1503.

Even in same-sex situations, the line between these two categories can be murky. *E.g.*, *McCoy v. Johnson Controls World Serv.*, 878 F. Supp. 229 (S.D. Ga. 1995) (white female plaintiff sexually harassed by African-American female co-workers.). In *McCoy*, Robin McCoy alleged that Marjorie Ivey rubbed her breasts against her, rubbed McCoy between her legs and forced her tongue down McCoy's throat, *id.* at 231, all of which would indicate sexual attraction. However, there was also evidence that Ivey and another co-worker called McCoy, "stupid poor white trash" or "stupid poor white bitch" and stated that they would make plaintiff quit, as they had made other "white bitches." *Id.* These comments would seem to show animosity, both racial and sexual. Since the harassment was by co-workers without the ability to promote or fire McCoy, quid pro quo sexual harassment was inapplicable. *Id.* at 231-32. The court properly decided that plaintiff demonstrated hostile environment sexual harassment and did not inquire into motive. *Id.* at 232. For another example where the line between attraction-based and hostility-based sexual harassment is unclear, see *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138 (4th Cir. 1996).

279. *E.g.*, *Waldenbook Co.*, 885 F. Supp. at 1102-04; *McCoy*, 878 F. Supp. at 232; *Prescott v. Indep. Life and Accident Ins. Co.*, 878 F. Supp. 1545, 1550 (M.D. Ala. 1995).

280. *E.g.*, *Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) ("[I]n each instance the question is . . . would the complaining employee have suffered the harassment had he or she been of a different gender?"); *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138, 142 (4th Cir. 1996).

ness heuristics, as a decision-making tool, is consistent with the use of schemas and cognitive psychology.²⁸¹ Accordingly, for judges who have held that same-sex sexual harassment is actionable under Title VII, the same-sex or cross-sex nature of the pairing is a distinction without significance;²⁸² like the difference between chairs with arms and those without, both are chairs.²⁸³

The lesbian and gay male schema may actually reinforce this congruence in a limited set of circumstances: when a gay supervisor harasses a non-gay employee. Recall that one aspect of the lesbian and gay male schema is the predatory, lustful, or purely sexual nature of homosexual liaisons that do not reflect loving, long-term relationships.²⁸⁴ Plaintiffs' attorneys in these cases have been known to capitalize on this schema to enlist the judge's antipathy towards gay people and to provoke sympathy for the victims of same-sex sexual harassment.²⁸⁵ It appears that proof of the unwelcome nature of the advances is unnecessary; no heterosexual plaintiff would have encouraged or desired this unnatural attention.

This use of the lesbian and gay male schema works only as a one-way ratchet. Same-sex sexual harassment is actionable when the harasser is homosexual and the victim heterosexual, but not the reverse, or when both are homosexual or both heterosexual. The court in *Pritchett v. Sizeler Real Estate Management Company*²⁸⁶ suggested a clue to deciphering this distinction. In *Pritchett*, a lesbian supervisor sexually harassed a female employee.²⁸⁷ The district court rejected precedent in the Fifth Circuit denying recovery for same-sex sexual harassment so that the court could protect non-gay

281. See *supra* note 47 and accompanying text.

282. E.g., *Wrightson*, 99 F.3d at 142; *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977); EEOC Compl. Man. (BNA) § 615.2(b)(3) (1987) ("The victim does not have to be of the opposite sex from the harasser.").

283. See *supra* note 11 and accompanying text.

284. See *supra* notes 70-72 and accompanying text; see, e.g., 142 Cong. Rec. H.7441, H.7444, (daily ed. July 11, 1996) (Rep. Coburn (R-Okla.) remarked on the Defense of Marriage Act, 28 U.S.C.A. § 1738C (West Supp. 1997): "[w]hat [my constituents] believe is that homosexuality is immoral, that it is based on perversion, that it is based on lust.").

285. Dale Carpenter, *Same Sex Sexual Harassment Under Title VII*, 37 So. TEX. L. REV. 699, 705 n.26 (1996).

286. *Pritchett v. Sizeler Real Estate Mgt. Co.*, 1995 WL 241855 (E.D. La. Apr. 25, 1995).

287. *Id.* at *1.

persons from the sexual predations of homosexuals.²⁸⁸

Giddens and *Garcia* [Fifth Circuit precedents denying coverage] notwithstanding, it seems discriminatory that a supervisor should be exempt from a Title VII sexual harassment claim solely because of that supervisor's sexual orientation. To deny a claim of same gender sexual harassment allows a homosexual supervisor to sexually harass his or her subordinates either on a quid pro quo basis or by creating a hostile work environment, when a heterosexual supervisor may be sued under Title VII for similar conduct. Although it is clear that Title VII does not protect a homosexual who is discriminated against based on his or her sexual orientation, here it is not the homosexual who seeks to be protected. To conclude that same gender harassment is not actionable under Title VII is to exempt homosexuals from the very laws that govern the workplace conduct of heterosexuals.²⁸⁹

This portion of the court's opinion is telling in several respects. First, the passage is consistent with *Smith* and with the distorting effect of the lesbian and gay male schema. The judge jumps immediately from the notion that, had a gay plaintiff been involved, the case would have been barred because Title VII does not cover sexual orientation discrimination. That conclusion is erroneous; the discrimination would still have been based on sex, not sexual orientation.

Second, one can hear in the *Pritchett* court's concern about providing an exemption for homosexuals an echo of the "no special rights" rhetoric of some anti-gay rights advocates²⁹⁰ and of the dissent in *Romer v. Evans*.²⁹¹ Although same-sex sexual harassment could now be actionable under Title VII, the holding merely closes a loophole that homosexuals could exploit. This is especially clear when we remember that the judge clarified that he was only protecting heterosexuals by this holding, not homosexuals.²⁹² This last point can only be true if one of three erroneous assumptions is valid: (1) title VII simply treats gay and lesbian plaintiffs

288. *Id.* at *2.

289. *Id.*

290. See, e.g., Pamela Coukos, *Civil Rights and Special Wrongs—The Amendment 2 Litigation*, 29 HARV. C.R.-C.L. L. REV. 580, 582, 584 (1994); see also Jane Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283 (1994).

291. *Romer v. Evans*, 116 S. Ct. 1620, 1630 (1996) (Scalia, J., dissenting).

292. *Pritchett*, 1995 WL 241855, at *2.

differently; (2) same-sex sexual harassment is only practiced by gay people against non-gay persons—and not against other gay individuals; or (3) gay persons' harassment of other gay people is not actionable sexual harassment equivalent to that suffered by non-gay victims.

The language of Title VII does not support the first option. The courts that have refused to extend the prohibition against sex discrimination in Title VII to cover sexual orientation do not simply exclude homosexual, but not heterosexual orientation. To be accurate, the research for this article has not discovered a case in which a non-gay person claimed sexual orientation discrimination under Title VII.²⁹³ Such a lopsided exclusion would, however, have been the result of the Aspen and Boulder, Colorado anti-discrimination ordinances had Colorado's Amendment 2 gone into effect.²⁹⁴ Further, the second cannot factually be correct; gay on gay sexual harassment must occur.²⁹⁵

The third option is untenable unless we consider the effects of the lesbian and gay male schema. Because that schema states that gay relations are purely uncontrolled, indiscriminate physical and sexual escapades,²⁹⁶ sexual advances by one homosexual towards another would not constitute harassment. Sexual attention cannot be unwelcome unless gay sexuality encompasses notions of selectivity and fidelity. If it does not encompass these notions, then sexual conduct in the workplace is always desirable, reciprocated and non-actionable.²⁹⁷ Accordingly, gay or lesbian victims

293. See *Fox v. Sierra Dev. Co.*, 876 F. Supp. 1169, 1175 (D. Nev. 1995). The *Fox* case comes closest. Plaintiffs claimed that they suffered sexual harassment as males because of the workplace discussions and pictures of gay sexual activity. *Id.* at 1172.

294. *Romer v. Evans*, 116 S. Ct. 1620, 1630 (1996) (citing COLO. CONST. art. II, § 30(b); ASPEN MUN. CODE § 13-98 (1977); BOULDER REV. CODE §§ 12-1-1 to 12-1-11 (1987) (banning discrimination, inter alia, on the basis of sexual orientation in employment, housing, accommodations) repealed to the extent that they would have prohibited discrimination against homosexuals, bisexuals, but remaining intact in their ban on discrimination against heterosexuals.); *Romer*, 116 S. Ct. at 1629; see *supra* notes 131-20 and accompanying text.

295. See generally, e.g., *Woman Wins \$ 360,000 Bias Case; Verdict May be First Where Boss, Employee Were Both Lesbians*, S.F. EXAM., July 4, 1997, at A7 (discussing jury award in California state lawsuit).

296. See, e.g., *supra* note 72 and accompanying text (discussing the gay identity as sex aspect of the lesbian and gay male schema).

297. The issue of unwelcomeness has also bedeviled sexually active female plaintiffs. E.g., *Burns v. McGregor Elecs. Indus.*, 989 F.2d 959 (8th Cir. 1993)

would not require protection from attraction-based sexual harassment because it would not truly occur in the legal sense. It is this last reading which makes the *Pritchett* court's exclusive protection of non-gay persons possible.

Finally, the *Pritchett* court leaves logical gaps in its analysis because it does not address the difference between attraction-based and hostility-based sexual harassment claims. *Garcia* and *Giddings* were hostility-based claims; the harassers were presumably heterosexual persons and the harassment victims were perhaps gay (or perceived to be gay). That is the only context in which one may properly speak of sexual orientation as the basis for a claim and of the corresponding exclusion of those claims from Title VII's coverage. Homosexuality, and not sex, is no more the foundation for an attraction-based sexual harassment suit than heterosexuality is the basis of a cross-sex sexual harassment cause of action. In both cases, the sexual orientation of the harasser is relevant only to explain why the harasser selected members of a particular sex as targets.²⁹⁸ But for their sex, the victims would not have been among the objects of the unwanted attention.

In hostility-based claims, however, the victims' sexuality may conceivably be the characteristic that provokes co-workers' behavior, and thus constitute the impermissible basis for the Title VII claim. Nevertheless, even in hostility-based claims, many of those suits are more accurately envisioned as gender-based causes of action within Title VII, as later portions of this article explain.²⁹⁹ Because of the confusion between of hostility- and attraction-based causes of action, the *Pritchett* court inappropriately analogizes two distinct factual constructs, thereby rendering a sexual harassment claim into one based on sexual orientation, thus not actionable.

Even where judges come to a correct conclusion, the distortions inherent in their schema of lesbians and gay men may lead to a skewed reading of facts or a mistaken application of legal doctrine. In an interesting twist on *Pritchett*'s one-way ratchet, the Fourth Circuit, in *Wrightson v. Pizza*

(woman who had pierced nipples and had posed semi-nude for magazine not thereby disqualified from claiming sexual harassment).

298. See *supra* note 253 and accompanying text.

299. See *infra* Part IV.B.2.b.

Hut of America, allowed a Title VII claim by a non-gay employee against his gay supervisor and co-workers, to withstand a motion to dismiss for failure to state a cause of action.³⁰⁰ Viewing the case as homosexual, attraction-based sexual harassment, the court properly analogized gay male-male harassment to Supreme Court and other male-female precedent. However, the actual facts of *Wrightson* are complex.

Wrightson contained many allegations of egregious conduct. Gay male supervisors and other gay employees sexually propositioned Arthur Wrightson and two other non-gay employees. They were subject to sexual innuendo, descriptions of gay sex, and inappropriately touched.³⁰¹ However, the court initially focused on the wrong issue regarding whether the perpetrator was gay.³⁰² The important preliminary issue should have been whether the sexual harassment was attraction- or hostility-based. Only if it was attraction-based, did the perpetrators' homosexuality provide the link to sex discrimination. Instead, the Fourth Circuit required that the harassers be gay,³⁰³ as though homosexuality alone is always an adequate substitute for desire-based sexual harassment.

Of course, gay people can be motivated by desire to harass others of the same sex. *Wrightson* may, in fact, be such a case. Nevertheless, gay people, like their non-gay counterparts, may have any number of possible rationales for their actions—not all of which are sexual or based on sexual desire. The schema of lesbians and gay men as predatory or indiscriminate in their sexual behavior enabled the court to make this inappropriate link.

The Fourth Circuit's insistence that the key allegation in same-sex sexual harassment is the perpetrator's homosexuality³⁰⁴ led the court to downplay other potentially important facts. Most striking is one initial fact mentioned by the court. "After Pizza Hut hired a male employee, the homosex-

300. *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138, 143 (4th Cir. 1996).

301. *Id.* at 139-41.

302. *See id.* at 141.

303. *Id.*

304. *Id.* at 144 ("Therefore, because a claim may lie under Title VII for same-sex hostile work environment sexual harassment, where, as here, the individual charged with the discrimination is a homosexual, the judgment of the district court is reversed.").

ual employees attempted to learn whether the new employee was homosexual or heterosexual. If the employee was heterosexual, then the homosexual employees began to pressure the employee into engaging in homosexual sex."³⁰⁵ This fact is significant, for it undermines Wrightson's claim of sex discrimination and may turn it into one based on sexual orientation. If gay male employees were not sexually harassed, but non-gay male employees were, the reason for the selection of Wrightson and the others appears to be their sexuality and not their sex.³⁰⁶ If this were truly attraction-based sexual harassment, why would the sole targets be non-gay males? It is difficult to believe that the non-gay Pizza Hut employees were always much more attractive than the gay employees. Either desire is not the true reason for their selection, or we need something else to explain the attractiveness of the non-gay males. The schema of predatory gay sex, where gay people recruit non-gay persons into sexual activity³⁰⁷ is consistent with the court's decision that targeting only non-gay males shows sexual harassment based on desire and not on sexual orientation.

Moreover, the court's description of another event also evidences the distorting effect of the lesbian and gay male schema: "Wilson [a gay employee] called Wentzel [a non-gay employee] at Wentzel's home and asked him on a date, even though Wilson was aware that Wentzel was heterosexual."³⁰⁸ The inference we are supposed to draw from the last clause of

305. *Id.* at 139 (citations to the record omitted).

306. When Pizza Hut made this argument, the court responded by stating that, on a motion to dismiss, Wrightson's claims were sufficient. *Id.* at 143. Wrightson stated that he was discriminated against because he was male, that his harassers were homosexuals, and that other harassed employees were also male. *Id.* at 143-44.

307. See, e.g., B.G. Gregg, *Group Says Gay Students Need Affirmation at School. Teacher: Goal Is Education, Not Recruitment*, CINCINNATI ENQUIRER, Dec. 22, 1996, at B4; Ernie Freda, *Washington In Brief*, ATLANTA J. & CONST., Oct. 12, 1995, at 6B (discussing the views of Rep. Newt Gingrich (R-Ga.), that school programs dealing with gays and lesbians may be thinly veiled efforts to recruit new homosexuals); Sandra Crockett & Chris Kaltenbach, *Ellen's Night Out; TV: While Many Turn out to Celebrate the Much-Hyped Event, Others Pledge Financial Consequences for Sponsors of the ABC Show*, BALTIMORE SUN, May 1, 1997, at 1E (describing the scene in which Laura Dern, playing the love interest in the episode, countered Ellen's accusation that she was trying to recruit gays by lamenting, "Just one more and I would have gotten that toaster oven.").

308. *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 140 (4th Cir. 1996).

the quote is that Wilson's request was unwelcome. Literally, however, it merely states that Wilson's request was probably futile because Wentzel was not gay. This implies that had Wentzel been gay, Wilson's demand would have been neither futile, nor unwelcome. Accordingly, there would have been no harassment.

That conclusion is possible only if the schema of lesbians and gay men is that gay sex is indiscriminate and non-selective. Note that we have no such schema about heterosexuality. A non-gay man can still harass a non-gay woman, although she may be sexually attracted to men—the question is unwelcomeness, not her sexuality.³⁰⁹ The sexuality-linked reading of unwelcomeness can, however, buttress the conclusion that gay male harassment of solely non-gay males is actionable sexual harassment. Gay targets of gay harassers would not have a cause of action because they would be unable to demonstrate unwelcomeness, something that is assumed with non-gay victims. Once again, the court uses homosexuality and its schema as a substitute for analysis of the relevant issues.

Finally, the *Wrightson* court's equation of gay perpetrators' sexual orientation with attraction-based sexual harassment may have led the court to over-emphasize the extent to which sexual desire actually motivated the harassers. Picture a workplace in which non-gay male employees first determine which new female hires are non-gay and which are lesbians. They then demand sexual favors only from the lesbian employees, tell them that they should try sex with men, grope them, and subject them to explicit descriptions of heterosexual sex acts.³¹⁰ Although we might view the behavior as motivated by a genuine desire to have sexual relations with these women, we would probably view the conduct as evidencing hostility toward lesbianism.³¹¹ The difference in our perception of these two scenarios is attributable to the considerably more nuanced schema of non-gay sexuality as

309. *Burns v. McGregor Elecs. Indus.*, 989 F.2d 959, 962 (8th Cir. 1993) (stating that the issue is the unwelcomeness of the conduct, not the sexual or other activities of the plaintiff).

310. *Cf. Wrightson*, 99 F.3d at 139-41 (describing similar behavior by the gay employees against the non-gay males).

311. *See generally*, Grose, *supra* note 214, at 388, 396 (asserting that courts find harassment by gay perpetrators covered under Title VII, but not by non-gay perpetrators whose victims are gay).

opposed to gay sexuality. We recognize and ascribe a wider range of rationales for non-gay people's behavior than we do with gay persons' conduct.

Certainly, the treatment Wrightson received was reprehensible. The Fourth Circuit may have been correct that it was attraction-based sexual harassment. Nevertheless, the flaws in the court's schema of lesbians and gay men caused it to gloss over significant issues and may have derailed its analysis.

If some judges are able to fit at least some same-sex, attraction-based claims into the cross-sex sexual harassment paradigm, why do other jurists refuse to do so? The cases that have held Title VII inapplicable to same-sex sexual harassment seem to focus on the harasser's membership in the same sex as the targeted employee. In *Hopkins v. Baltimore Gas & Electric Company*,³¹² the court stated:

[I]t . . . seems peculiar to call sexual harassment of a male by a male, or of a female by a female, sex discrimination What the harasser is really doing is preferring or selecting some one member of his [own] gender for sexual attention, however unwelcome that attention may be to its object. He certainly does not despise the entire group, nor does he wish to harm its members, since he is a member himself and finds others of the group sexually attractive.³¹³

Several flaws inhere in the quoted explanation. First, attraction-based sexual harassment is a form of disparate treatment; but for the employee's sex, he or she would not have been among the objects of the harasser's attentions.³¹⁴ It is not necessary to delve into the psychosocial aspects of sexual harassment, into why the harassment occurs, in order to link it to other forms of sex discrimination. It stands on its own bottom.

Second, the argument quoted above is reminiscent of the original arguments against cross-sex sexual harassment that have been rejected by the Supreme Court:³¹⁵ that sexual har-

312. 871 F. Supp. 822 (D. Md. 1994), *aff'd*, 77 F.3d 745 (4th Cir. 1996).

313. *Id.* at 833 (quoting *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334, 1337 n.1 (D. Wyo. 1993)); Paul, *supra* note 246, at 351-52.

314. See, e.g., *Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981); *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977); *Williams v. District of Columbia*, 916 F. Supp. 1, 7 (D.D.C. 1996).

315. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68-69 (1985) (stating that the focus of the offense is the unwelcomeness of the harasser's conduct, and not

assment is not sex discrimination because the harasser does not denigrate the targeted sex, but rather, finds certain of its members sexually attractive.³¹⁶

Finally, this perspective once again imports hostility-based sexual harassment issues into the attraction-based context. Hostility-based sexual harassment suits may be part of a pervasive atmosphere of viewing one sex as inferior.³¹⁷ Nevertheless, Title VII sex discrimination focuses on the disparate treatment of certain employees based on sex, not the social dynamics of the workplace.³¹⁸ Failure to recognize this distinction has caused some courts to insist that same-sex, attraction-based, sexual harassment also evidence the perceived inferiority of the harassed employee's sex. The forced adherence to a theoretical construct, unnecessary to the application of current legal rules and developed in the context of heterosexual feminist philosophy,³¹⁹ has derailed these courts from proper analysis of same-sex cases.

Moreover, to the extent that in cross-sex, hostility-based, sexual harassment suits men may target women because of hostility toward the female sex, the same may be true of same-sex sexual harassment where a man selects another man because of hostility toward, rather than attraction to, his sex. This situation is the only one in which the fact that the harasser belongs to the same sex as the victim is relevant—and even then, in only an oblique manner. To the extent that the hostility-based harassment stems from a belief that all members of a particular sex are inferior or unwelcome in the workplace, it is correct to question whether members of the same sex can logically hold those beliefs.³²⁰

voluntariness or anything else).

316. *E.g.*, *Vinson v. Taylor*, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., dissenting, joined by Scalia & Starr, JJ.)

317. *See supra* notes 259-266 and accompanying text.

318. EEOC Compl. Man. (BNA) § 615.2(b)(1) (1987).

319. *See supra* note 261 and accompanying text.

320. Although, of course, the phenomenon of self-hatred is well recognized. *See, e.g.*, *Castenada v. Partida*, 430 U.S. 482, 505 (1977) (Marshall, J., dissenting) ("[M]embers of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority. Such behavior occurs with particular frequency among members of minority groups who have achieved some measure of political success and thereby have gained some acceptability among the dominant group."); MARY ELLEN GOODMAN, *RACE AWARENESS IN YOUNG CHILDREN*, 55-58, 60 (rev. ed. 1964); *Specifically Designed Programs Focusing on Gay Drug Addicts*, *NEWSDAY*, May 2, 1993, at 69

None of the same-sex, attraction-based, sexual harassment cases fall into that scenario. The above quotation illustrates that failure to distinguish between attraction- and hostility-based sexual harassment leads to confusion and the inappropriate importation of concepts unique to a single class of hostility cases, into a different, attraction-based set of circumstances.

Further, if it is illogical to impute a belief that the victim's sex is inferior when the harasser is also a member of that sex, that illogic stems from the fact that the harasser identifies him or herself as part of the same group as the victim. Harassment of lesbians and gay men, as lesbians or gay men, is not within that narrow slice of the sexual harassment spectrum. If the non-gay perpetrator selects the victim because he or she is a gay male or a lesbian, the shared identity vanishes along with the logical inconsistency. While the sex of the victim is not the motivating force, the victim's perceived or actual sexual orientation is. Because anti-gay discrimination is excluded from Title VII protection,³²¹ courts must be precise in their examination of same-sex sexual harassment, so as not to reject more victims of sexual harassment than the exclusion demands.

Another possible justification for the asymmetry in treatment of same-sex and cross-sex sexual harassment relies on the difference gender makes in society. Some courts that have held Title VII inapplicable to same-sex sexual harassment, have adopted this gender asymmetry position. These courts require a prototypical attraction-based sexual harassment claim to evidence inferiority or power imbalances between the sexes. While gender power imbalance theory may be useful in some contexts, it is not helpful here. In cross-sex, male on female sexual harassment, the difference between attraction- and hostility-based harassment is often blurred. Arguably, even attraction-based behaviors evidence hostility towards women by viewing them as sexual playthings first, and not as workplace equals.³²² This dual motivation harassment context is the one most relevant to gender power imbalance theory.

(discussing self-hatred as a reason for alcoholism and drug abuse among gay people).

321. See *supra* notes 154-155 and accompanying text.

322. See *supra* notes 259, 262 and accompanying text.

However, as the noted feminist scholar, Catharine MacKinnon, remarked, "the problem with gay harassment is that it does not involve a difference between the sexes."³²³ Thus, gender power imbalance theory is misplaced in the context of same-sex sexual harassment. Indeed, the transformation of attraction-based harassment into hostility-based actions derives much of its power from gender difference. The theory posits that even attraction-based conduct is premised on the inferior position of women and the subordinating effect of sexual harassment. Without a gender difference, as in same-sex situations, there is no intrinsic power imbalance. Accordingly, courts need to analyze same-sex sexual harassment differently and maintain, rather than blur, a clearer analytical distinction between attraction- and hostility-based conduct.

Much of the confusion in this area can be traced to *Goluszek v. Smith*.³²⁴ That decision on same-sex sexual harassment, and its underlying theory are in error. Anthony Goluszek was a male employee singled out by his presumably heterosexual male supervisor and co-workers. They created a sexually charged workplace in order to intimidate and make life difficult for a man who had "never been married nor [had] he lived anywhere but at his mother's home"³²⁵ and who came from an unsophisticated background with little or no sexual experience.³²⁶ In *Goluszek*, a hostility-, not attraction-based, sexual harassment matter, the court stated that Title VII was essentially focused on power imbalances in the workplace.³²⁷ It held that women suffer discrimination through harassment because male-domination exploits, degrades, and makes women inferior because of gender.³²⁸ Therefore, the court concluded that Goluszek, a male in a male-dominated workplace, "may have been harassed 'because' he is a male but that harassment was not of a kind which created an anti-

323. MacKinnon, *supra* note 241, at 204.

324. 697 F. Supp. 1452 (N.D. Ill. 1988). See, e.g., *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994); *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp. 822, 833-34 (D. Md. 1994); *Quick v. Donaldson Co.*, 895 F. Supp. 1288, 1295-96 (S.D. Iowa 1995).

325. *Goluszek*, 697 F. Supp. At 1453.

326. *Id.*

327. *Id.* at 1456.

328. *Id.*

male environment in the workplace.”³²⁹ The court chose to apply its version of the congressional intent behind Title VII rather than a “wooden application of the verbal formulations created by the courts” which would have permitted Goluszek’s claim.³³⁰

This argument is a variation of the gender power imbalance theory discussed earlier³³¹ and suffers from the same flaws. The *Goluszek* court’s startling reading of the congressional intent behind Title VII did not come from Congress,³³² but from a 1984 student Note and one circuit court case.³³³ Although the Note’s author recognized same-sex sexual harassment, the Note defined sexual harassment “to describe only harassment of women by men, because the historically inferior position of women in a male-dominated workforce . . . has resulted in the disproportionate exposure of women to heterosexual sexual harassment.”³³⁴ Thus, the author had no intention of applying the theory to same-sex sexual harassment.

Moreover, the Note was written in 1984, prior to the Supreme Court’s decisions in *Meritor* and *Harris*, and the development of Title VII jurisprudence on sexual harassment. It did not address attraction-based sexual harassment, but attempted to create an alternative theoretical basis for hostile environment-type cases that would allow women to recover for loss of dignity and psychological effects, as well as for tangible job benefits.³³⁵ The Note’s gendered power imbalance theory was prescriptive, rather than descriptive of contemporaneous cases.³³⁶ The Supreme Court in *Harris*, subsequently provided a remedy for these types of abusive work environment injuries; a remedy that did not depend on

329. *Id.*

330. *Id.*

331. See *supra* notes 323 and accompanying text.

332. Indeed, the theory is without foundation in Title VII’s legislative history. *Prescott v. Indep. Life & Accident Ins. Co.*, 878 F. Supp. 1545, 1550 n.5 (M.D. Ala. 1995); *Raney v. District of Columbia*, 892 F. Supp. 283, 286-87 (D.D.C. 1995).

333. *Id.* (citing Note, *Sexual Harassment Claims of Abusive Work Environments Under Title VII*, 97 HARV. L. REV. 1449 (1984); *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210 (7th Cir. 1986)).

334. See Note, *supra* note 332, at 1449 n.1 (citation omitted).

335. *Id.* at 1452-53.

336. *Id.* at 1450 (calling for an innovative judicial approach to abusive environment claims, and demonstrating the efficacy of alternatives to the existing legal regime).

the gendered power theory.³³⁷

In addition, the court in *Goluszek* lifted from the Note, language of workplace inequality, without comprehending the gender-specific nature of the argument.³³⁸ There is an analog to gendered power discrepancy analysis in same-sex sexual harassment. However, it is inapplicable to attraction-

337. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-23(1993).

338. This misunderstanding had significant ramifications for analyzing the facts of *Goluszek* itself. See *infra* notes 452-461 and accompanying text. One commentator has argued that the power imbalance theory applies to all types of sexual harassment, male on female, female on male, male on male, and female on female. Carolyn Grose, *Same-Sex Sexual Harassment: Subverting the Heterosexist Paradigm of Title VII*, 7 YALE J.L. & FEMINISM 375, 380-85 (1995). The power imbalance theory posits that sexual harassment is about male subordination of women and is unique to that relationship. *Id.* at 382. Consequently, only the first of these pairings, male on female sexual harassment, is actionable under Title VII. *Id.* at 385. Under this view, the fact that a male subordinate can sexually harass a female supervisor, see, e.g., *Cronin v. United Serv. Stations Inc.*, 809 F. Supp. 922, 931-32 (M.D. Ala. 1982), does not vitiate the argument, but reinforces it; the male is always dominant socially, even if inferior in the workplace. The social power imbalance overcomes workplace hierarchy. Cf. Grose, *supra* at 381, 383. This argument draws heavily on the work of Catharine MacKinnon. See, e.g., CATHARINE MACKINNON, FEMINISM UNMODIFIED 107 (1987); Grose, *supra* at 380-85; MACKINNON, *supra* note 241, at 209-10, 235.

While *Goluszek* and other concurring courts apply a variation of this argument to bolster their rejection of same-sex sexual harassment, e.g., *Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988); *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp. 822, 834 (Md. 1994), no court has yet ruled that female on male sexual harassment is not actionable. Indeed, the Supreme Court, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)), other lower courts, e.g., *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995); *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977), and the EEOC, EEOC Compl. Man. (BNA) § 615.2(b)(1) (1987), have recognized that men can be victims of sexual harassment as well as its perpetrators. Moreover, sexual harassment is analogous to harassment on the basis of race or religion. *Meritor*, 477 U.S. at 66 (collecting cases); *Harris*, 510 U.S. at 25-26 (Ginsburg, J., concurring). But see *Hopkins*, 871 F. Supp. at 834 n.21; J. Thorpe, Note, *Gender-Based Harassment*, DUKE L.J. 1361, 1378 n.80 (1990). In addition, same race-discrimination violates Title VII. *Walker v. Secretary of the Treasury*, 713 F. Supp. 403 (N.D. Ga. 1989) (light skinned African-American discriminated against dark-skinned African-American).

Finally, other courts have flatly rejected the power imbalance theory of sexual harassment. *Prescott v. Indep. Life & Accident Ins. Co.*, 878 F. Supp. 1545, 1550 (M.D. Ala. 1995); *Griffith v. Keystone Steel & Wire*, 887 F. Supp. 1133, 1136-37 (C.D. Ill. 1995). The theory is contrary to the logic of Title VII. Cf. *Mogliefsky v. Superior Court*, 26 Cal. Rptr. 2d 116, 120 (Cal. Ct. App. 1993) (CAL. GOVT. CODE § 12940 (West 1992), male on male sexual harassment). Nevertheless, it provides a mechanism to drive a doctrinal wedge between Title VII cross-sex sexual harassment precedent and same-sex sexual harassment circumstances.

based claims. The appropriate analogy includes hostility-based harassment.³³⁹ The analysis must consider the gender relationships among members of the same sex in same-sex abuses, not wipe them out as the court did in *Goluszek*.³⁴⁰

In attraction-based, same-sex, sexual harassment claims, there is obviously no gendered power imbalance between the sexes, because only one sex is affected.³⁴¹ The gendered power theory is irrelevant to an attraction-based sexual harassment cause of action.³⁴² Inferiority or depriving victims of workplace equality may conceivably be the core of a hostile environment case,³⁴³ and may create the necessary nexus between sex and the employer's actions. However, in an attraction-based sexual harassment cause of action, the connection between the employer's conduct and sex is direct, but-for causation. But for the sex of the employee, there would be no possibility of sexual desire on behalf of the harasser.³⁴⁴

One need not return to the days when courts viewed sexual harassment as mere personal peccadilloes of the employer³⁴⁵ to recognize that sometimes sexual attraction is just that, sexual attraction, and not hidden intimidation or superiority.³⁴⁶ Gay or lesbian attraction for members of their own sex is no more complex or distinct from the attraction of non-gay women and men for each other.³⁴⁷ But for the sex of the targeted employee, he or she would not have been within the class of persons susceptible of harassment.³⁴⁸

339. See *infra* notes 401-461 and accompanying text.

340. See *infra* notes 458-460 and accompanying text.

341. Accord MACKINNON, *supra* note 241, at 205. However, there may obviously be non-gendered power dynamics at work, e.g., supervisor-employee, etc.

342. See generally Note, *supra* note 333; Scott v. Sears, Roebuck & Co., 798 F.2d 210 (7th Cir. 1981). Both the *Harvard Law Review* Note and Scott concerned hostility-based claims.

343. Scott, 798 F.2d at 213.

344. E.g., Williams v. District of Columbia, 916 F. Supp. 1, 7 (D. D.C. 1996); accord Harris v. Forklift Sys., 510 U.S. 17, 25-26 (1993) (Ginsburg, J., concurring).

345. E.g., Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975), vacated, 562 F.2d 55 (9th Cir. 1977).

346. Or, as Freud is reputed to have said, "Sometimes a cigar is just a cigar." E.g., Tim Rosaforte, *Beyond Two Straight for Kuehne Cigar Craze*, TIME, Aug. 19, 1996, at G26.

347. Indeed, gay men view sex as men do generally, and have more in common with non-gay men than they do with women. See, e.g., CHARLES SILVERSTEIN, MAN TO MAN: GAY COUPLES IN AMERICA, 328-329 (1982); KATE WESTON, FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP, 138, 140 (1991).

348. See, e.g., Williams, 916 F. Supp. at 7 (female employee sexually harassed

Perhaps the most striking example of an unthinking adherence to an inapplicable rule, or more specifically, to an inappropriate schema³⁴⁹ in the face of more appropriate cross-sex precedent, is *Myers v. City of El Paso*.³⁵⁰ Reyna Sanchez, a female supervisor, made comments about the size of Veronica Myers's breasts, buttocks, hair and clothing, slid a pen down Myers's blouse while Myers was on the phone, and turned Myers around by the hips to open her blazer to "see what [Myers] had underneath."³⁵¹ If a man had engaged in Sanchez's behavior, it would have been considered sexual harassment.³⁵² However, the Myers court merely cited *Garcia v. Elf-Atochem North America*³⁵³ and stated that the rule in the Fifth Circuit was that Title VII prohibits gender discrimination and not a claim for same-gender discrimination: "[T]here [was] no dispute as to the material facts that Myers is a female, as is her superior, Sanchez. Under Fifth Circuit law, Myers' claim of sexual harassment must fail."³⁵⁴ While the court was bound to apply precedent in deciding this matter,³⁵⁵ the decision as to whether *Garcia* was applicable precedent was far from preordained. A little more reflection might have resulted in a conclusion that *Garcia* was a hostility-based sexual harassment case, perhaps even between two heterosexuals, while *Myers* concerned attraction-based sexual harassment between a supervisor and a woman she desired, a situation where the more appropriate precedent may have been *Meritor*.³⁵⁶

by female supervisor); *Wright v. Methodist Youth Servs.*, 511 F. Supp. 307, 310 (N.D. Ill. 1981) (male employee harassed by male supervisor).

349. See BROWER & NURIUS, *supra* note 10, at 15.

350. *Myers v. City of El Paso*, 874 F. Supp. 1546 (W.D. Tex. 1995).

351. *Id.* at 1547.

352. Compare *Myers v. City of El Paso*, 874 F. Supp. 1546 (W.D. Tex. 1995), with *Stewart v. Cartessa*, 57 Fair Empl. Prac. Cases (BNA) 1717 (1990); *King v. Hillen*, 21 F.3d 1572 (Fed. Cir. 1994); *Gilardi v. Schroeder*, 833 F.2d 1226 (7th Cir. 1987).

353. *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 448 (5th Cir. 1994).

354. *Myers*, 874 F. Supp. at 1548.

355. WALTER & FAJANS, *supra* note 7, at 32-33. However, remember that the court in *Pritchett* disregarded the same Fifth Circuit precedents in order to make a gay perpetrator liable for sexual harassment of a non-gay victim. *Pritchett v. Sizeler Real Estate Mgt. Co.*, 1995 WL 241855, at *2 (E.D. La. Apr. 25, 1995).

356. The fairly unrestricted choice that a judge has in deciding which precedent is applicable to the case before her has been the subject of a long academic debate. See, e.g., MARK TUSHNET, RED, WHITE & BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 48-54 (1988).

Garcia hardly deserves the unthinking adherence it has received from *Myers* and from other cases.³⁵⁷ Not only are the facts vague, but the court's reasoning is virtually nonexistent. Freddie Garcia alleged that on several occasions his supervisor, Rayford Locke had "reach[ed] around and grab[bed] [Garcia's] crotch area and ma[de] sexual motions from behind [Garcia]."³⁵⁸ Although a woman subjected to this type of unwanted sexual conduct by her supervisor would have had a sexual harassment claim,³⁵⁹ the Fifth Circuit rejected any finding of liability:

Finally, we held in *Giddings v. Shell Oil Co.*, No. 92-8533 (5th Cir. Dec. 6, 1993) (unpublished), that "[h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones." *Accord Goluszek v. Smith*, 697 F. Supp. 1456 (N.D. Ill. 1988). Title VII addresses gender discrimination. Thus, what Locke did to Garcia could not in any event constitute sexual harassment within the purview of Title VII, and hence summary judgment in favor of all defendants was proper on this basis also.³⁶⁰

flexively rejected Title VII liability without any investigation into relevant cross-sex sexual harassment precedent. Indeed, as quoted above, the Fifth Circuit merely reiterated what it had said in an unpublished opinion, without any discussion of the facts in that case. Further, the court in *Garcia* distinguished gender [read sex] discrimination from same-gender [read sex] discrimination with merely an oblique reference to *Goluszek*.³⁶¹ The citation to *Goluszek* further confused this issue. *Goluszek* concerned sexual harassment by a male supervisor and other presumably heterosexual employees.³⁶²

357. See, e.g., *Sarff v. Continental Express*, 894 F. Supp. 1076, 1082 (S.D. Tex. 1995); *Myers v. City of El Paso*, 874 F. Supp. 1546, 1548 (W.D. Tex. 1995); cf. *Oncale v. Sundowner Offshore Servs., Inc.* 83 F.3d 118, 120 (5th Cir. 1996), cert. granted, 65 U.S.L.W. 3814 (June 9, 1997) (questioning the appropriateness of *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446 (5th Cir. 1994), but applying it anyway).

358. *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 448 (5th Cir. 1994).

359. See, e.g., *Anderson v. YARP Restaurant, Inc.*, 1997 U.S. Dist. LEXIS 560 (S.D.N.Y. Jan. 22, 1997).

360. *Garcia*, 28 F.3d at 451-52 (citations omitted).

361. *Id.* at 452 (citing *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988), for the proposition that Title VII addressed gender discrimination only).

362. *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988).

They targeted Goluszek for sexual teasing and innuendo because of Goluszek's total lack of sexual experience.³⁶³ Although this type of sexually charged atmosphere can violate Title VII, in the context of lesbians and gay men, it calls for a more refined analysis than is evident in that case and in *Garcia*.³⁶⁴

Finally, the facts regarding *Garcia*'s harassment are ambiguous. The Fifth Circuit mentioned that other employees had complained of arguably similar actions by Locke, but that his conduct had been "viewed as horseplay"³⁶⁵ and was not alleged to be sexually motivated.³⁶⁶ The court's opinion is unclear as to who viewed Locke's conduct as horseplay. The implied subject of the passively voiced sentence seems to be the two other harassed male employees. Even if viewed as horseplay, the conduct still involved a form of undesired, sexually-themed touching. Moreover, the implication of the court's contrast between horseplay and sexual motive is that sexual harassment must be based on desire to be actionable. Accordingly, *Garcia* blurred the distinction between two different types of same-sex sexual harassment: (1) harassment based on sexual attraction, where the cross-sex harassment paradigm is typified by *Meritor*,³⁶⁷ and (2) harassment based on sexual hostility and intimidation, where the cross-sex paradigm is *Harris*.³⁶⁸ The conflation has misled courts from the relevant parallels with cross-sex sexual harassment cases.

Complicating same-sex sexual harassment cases is the long-standing doctrine that Title VII does not protect against discrimination on the basis of sexual orientation.³⁶⁹ As in *Pritchett*, judges have been quick to seize upon this precedent

363. *Goluszek*, 697 F. Supp. at 1453-54.

364. See *infra* notes 401-461 and accompanying text.

365. The "boys will be boys" approach to the conduct is reminiscent of early cross-sex sexual harassment cases. See, e.g., *Corne v. Bausch & Lomb*, 390 F. Supp. 161, 163-64 (D. Ariz. 1975); *Miller v. Bank of Am.*, 418 F. Supp. 233, 236 (N.D. Cal. 1976). That cavalier attitude toward same-sex sexual harassment is often in sharp contrast to the view of cross-sex sexual harassment. E.g., *Nabozny v. Podlesny*, 1996 U.S. App. LEXIS 18866, *20-*22 (7th Cir. July 31, 1996) (difference in treatment of those two situations raises an Equal Protection challenge.)

366. *Garcia*, 28 F.3d at 448.

367. See discussion *supra* Part IV.B.2.a.

368. See discussion *supra* Part IV.B.2.b.

369. E.g., *DeSantis v. Pac. Tel. & Tel. Co., Inc.*, 608 F.2d 327, 329-30 (9th Cir. 1979).

and import it into cases where it does not belong. Just as the lesbian and gay male schema leads judges to equate gender atypical behavior with homosexuality,³⁷⁰ same-sex interaction of a sexual nature often transforms a sexual harassment case into a sexual orientation matter, thereby rendering an actionable instance of sex discrimination beyond the scope of Title VII.

Because schemas can be contradictory, intersecting in a myriad of ways, individual cases can evince a number of different schemas. This article has already examined quite a few ways in which aspects of the lesbian and gay male schema interacts with sexual harassment prototypes: (1) The fact that a lesbian or gay male plaintiff is involved provokes some judges to refuse Title VII relief entirely, reasoning that any actions taken must have been based on sexual orientation, not sex.³⁷¹ (2) The belief that gay identity is purely sexual behavior divorced from love or fidelity; therefore, homosexual advances against another gay person are rarely considered to be unwelcome or offensive.³⁷² (3) The strength of the prototype sexual harassment schema as male on female, gendered sexual attraction clouds the ability of some judges to analyze some same-sex scenarios,³⁷³ even as it increases the inclusion of others.³⁷⁴

Moreover, the terms of the prototype or schema used, dictate the resulting categorization or use of analogy.³⁷⁵ Because judges measure same-sex sexual harassment claims against a flawed prototype, they make commensurately flawed analogies and decisions. Accordingly, many jurists discount or ignore important distinctions or similarities between cross-sex and same-sex sexual harassment, because male on male or female on female sexual harassment does not conform to their gender power imbalance schema or prototype. We tend to find explanations or precedent in line with our schemas, in part, because they are the only ones for which we are looking.³⁷⁶ We also attempt to interpret the

370. *E.g.*, *Smith v. Liberty Mut. Ins. Co.*, 395 F. Supp. 1098, 1099 (N.D. Ga. 1975); *see also supra* notes 182-213 and accompanying text.

371. *See supra* notes 182-209 and accompanying text.

372. *See supra* note 297 and accompanying text.

373. *See supra* note 313 and accompanying text.

374. *See supra* notes 284-285 and accompanying text.

375. BROWER & NURIUS, *supra* note 10, at 86.

376. Tversky & Kahneman, *Judgment Under Uncertainty: Heuristics and*

welter of ambiguous or contradictory information in a manner that makes sense to us, whether or not it is accurate.³⁷⁷ The Fourth Circuit's rather selective reading of the facts of *Wrightson v. Pizza Hut of America* evidences these aspects of schema theory.³⁷⁸

The District Court opinion *Hopkins v. Baltimore Gas & Elec.*,³⁷⁹ illustrates many of the analytical flaws in attraction-based cases provoked by the inaccuracies of the courts' schema of lesbians and gay men. George Hopkins alleged that his supervisor, Ira Swadow, subjected him to a sexually charged hostile work environment.³⁸⁰ Swadow apparently entered the men's room while Hopkins was there alone and pretended to lock the door, saying, "Ah, alone at last."³⁸¹ Swadow wrote "S.W.A.K. Kiss, Kiss" (Sealed With A Kiss) on mail addressed Hopkins, and wrote "Alternate" in front of the company name "Lifestyles" on another piece of Hopkins's mail.³⁸² He also put a magnifying glass over plaintiff's crotch, asking, "Where is it?" and made other sexual innuendoes.³⁸³

In reviewing sexual harassment jurisprudence, the district court noted that Title VII does not prohibit discrimination on the basis of sexual orientation or transsexualism.³⁸⁴ Finding that the Supreme Court in *Vinson* and *Harris* did not address the precise issue before it, the court canvassed the cases involving same-sex sexual harassment³⁸⁵ and concluded that Title VII was inapplicable because it found no

Biases, 185 SCI. 1124-31 (1974); Tversky & Kahneman, *Availability: A Heuristic for Judging Frequency Probability*, 5 COGNITIVE PSYCHOL. 207 (1973).

377. BROWER & NURIUS, *supra* note 10, at 86.

378. See *supra* notes 300-311 and accompanying text.

379. *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp. 822 (D. Md. 1994), *aff'd*, 77 F.3d 745 (4th Cir. 1996).

380. *Id.* at 824.

381. *Id.* at 825.

382. *Id.* at 824.

383. *Id.* at 825.

384. *Hopkins*, 871 F. Supp. at 832 n.7 (citing *inter alia* *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989), *cert. denied*, 493 U.S. 1089 (1990) (sexual orientation); *DeSantis v. Pacific Tel. & Tel. Co. Inc.*, 608 F.2d 327 (9th Cir. 1979) (same); *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984), *cert. denied*, 471 U.S. 1071 (1985) (transsexualism); *Dillon v. Frank*, 58 Empl. Prac. Dec. (CCH) ¶ 41,332 at 70,102 (6th Cir. 1992) (assumed homosexuality). Of course, homosexuality and transsexuality are not coextensive. *Ulane*, 742 F.2d at 1083 n.3.

385. The court's term is "same-gender," apparently using "sex" and "gender" interchangeably. *Hopkins*, 871 F. Supp. at 832.

congressional intent for its application.³⁸⁶ Alternatively, the court found that Swadow's conduct was neither directed at plaintiff because of his sex, sufficiently severe, nor containing explicit or implicit demands on him for sexual favors.³⁸⁷

The court's reference to congressional intent is puzzling. If the court meant that Title VII did not apply because Hopkins' alleged sexual orientation claim was not envisioned by Congress, the court is in error. Homosexuality was not the basis of Hopkins' cause of action regardless of Title VII's lack of coverage. The court viewed it as such merely because of the same-sex sexual interaction foisted on Hopkins. The court's alternative holding is no less cryptic. If sexual attraction drove Swadow's behavior, it was directed at plaintiff because of his sex. The parallels to cross-sex, attraction-based sexual harassment should have been clear. Perhaps the court meant to say that the conduct was not sufficiently severe to be actionable, although courts have found liability for similar male conduct directed at women.³⁸⁸ To the extent that the court's view on severity was informed by the belief that homosexual attentions could not have been unwelcome by a gay plaintiff, the court employed a false aspect of the lesbian and gay male schema.³⁸⁹ Finally, if the court intended to deny liability because the conduct stemmed from hostility toward and not attraction to Hopkins, as is more likely the case, then the court employed an incomplete schema of sexual harassment.³⁹⁰ Because its prototype of sexual harassment was flawed, the court inappropriately analyzed the situation.

b. *Hostility-Based Sexual Harassment*

Although the line between desire and hostility may be a fine one,³⁹¹ for Title VII, same-sex sexual harassment juris-

386. *Id.* at 833-35.

387. *Id.* at 835. The Fourth Circuit affirmed the district court on this last ground. *Hopkins*, 77 F.3d at 754; *Id.* at 755 (Wilkinson, Hamilton, JJ., concurring in part). Judge Niemeyer alone would have reversed the district court's categorical denial of same-sex sexual harassment liability. *Id.* at 751.

388. *See, e.g.,* *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446 (7th Cir. 1994); *Zorn v. Helene Curtis, Inc.* 903 F. Supp. 1226 (E.D. Ill., 1995).

389. *See supra* notes 296-297, 309 and accompanying text.

390. *See supra* notes 310-311 and accompanying text; *see also infra* notes 408-415 and accompanying text.

391. *Cf. AUGUST STRINDBERG, A MADMAN'S MANIFESTO*, Pt. 4, Ch. 10 (Anthony Swerling trans., Univ. of Alabama Press, 1971) ("A hatred was kin-

prudence, the divide between the two sides is significant. Where sexual harassment springs from desire, the parallels to cross-sex sexual harassment are clear; only the coincidence of the sex of the protagonists is different. That courts sometimes fail to recognize that this factual difference is only marginally relevant to the legal issues is puzzling only if one ignores cognitive psychology and the presence of the lesbian and gay male schema.

Cases evidencing sexual harassment on the basis of hostility or intimidation towards lesbians or gay men, or persons thought to be lesbians or gay men, are analytically more difficult. These cases can be divided into two groups: (1) those situations in which the lesbian and gay male schema masks the true basis for the discrimination, *viz.* gender conformity and sex discrimination, and (2) those in which the basis is truly sexual orientation or homosexuality *per se*. In the former, Title VII should apply; in the latter, it does not, but should not either.

Because of the impact of the lesbian and gay male schema, the hostility cases can be difficult to separate cleanly into the two categories.³⁹² We must carefully examine the mechanisms of the harassment. Significantly, "because of sex" does not always imply a specific motivation in cross-sex sexual harassment suits. A man might sexually harass a woman because he believes her and all women to be inferior to him or because he dislikes her personally. The first scenario is sexual harassment, pure and simple.³⁹³ The second is sexual harassment when the form in which the dislike is expressed is sexual in nature.³⁹⁴

In *Winsor v. Hinckley Dodge Co.*,³⁹⁵ colleagues strongly disliked a female automobile sales associate, perceived her to be stealing clients from other sales personnel, and viewed her as being overly aggressive.³⁹⁶ Conduct motivated by those

dled in me, a hatred more fatal than indifference since it constituted the reverse of the love which was slipping away thus: I hated her because I loved her.").

392. See *Dillon v. Frank*, 58 Empl. Prac. Dec. (CCH) ¶ 41,332, at 70,102 (6th Cir. 1992) and accompanying text.

393. See, e.g., *A. Sam & Sons Produce Co.*, 872 F. Supp. at 35-36.

394. See, e.g., *Winsor v. Hinckley Dodge Co.*, 79 F.3d 996, 1000 (10th Cir. 1996).

395. 79 F.3d 996 (10th Cir. 1996).

396. *Id.* at 998. Although aggressiveness was one of the disfavored traits mentioned in *Winsor*, the *Price Waterhouse* cross-gender schema does not ap-

perceptions falls outside the purview of Title VII. However, the personal animosity towards plaintiff took the form of a male employee pinning her against the wall and shoving his knee between her legs, as well as subjecting her to sexually explicit epithets.³⁹⁷ The court rejected the employer's claim that the conduct was solely motivated by personal dislike.³⁹⁸ Rather, the Tenth Circuit found that even if the original motive of the conduct were gender-neutral, its expression in a sexually intimidating manner made it discrimination on the basis of sex.³⁹⁹ Vulgarity and epithets may have different meanings when directed at women; they become gender specific, and are a direct affront to women's self-respect.⁴⁰⁰ The key to properly understanding these cases is the subliminal message of dominance sent to, or of inferiority felt by, the harassment victim.

*McWilliams v. Fairfax County Board of Supervisors*⁴⁰¹ is factually parallel to *Winsor*, yet homosexuality and its role in same-sex sexual harassment inveigled the Fourth Circuit in *McWilliams*.⁴⁰² Fellow workers sexually abused McWilliams, a mentally disabled male mechanic working in an all-male worksite.⁴⁰³ They pushed him to his knees and made him the victim of simulated oral sex.⁴⁰⁴ A co-worker exposed himself to McWilliams and pulled him toward a bathroom stall.⁴⁰⁵ Unable to resist, employees rubbed McWilliams' penis until it

pear to be at work in this case.

397. *Id.* at 998-99; *accord* *Quick v. Donaldson, Co.*, 90 F.3d 1372, 1379 (8th Cir. 1996) (personal dislike of plaintiff cannot easily excuse sexually-themed male-male attacks).

398. *Winsor*, 79 F.3d at 1000.

399. *Id.*

400. *Id.* (citing *Burns v. McGregor Elecs. Indus., Inc.*, 989 F.2d 959, 965 (8th Cir. 1993); *A. Sam & Sons Produce Co.*, 895 F. Supp. at 35-36; *accord Quick*, 90 F.3d at 1378 ("The district court also erred in determining that the challenged conduct was not of a genuine sexual nature and therefore not sexual harassment. The court concluded that neither bagging nor the physical attacks expressed sexual interest nor involved sexual favors or comments. A worker need not be propositioned, touched offensively, or harassed by sexual innuendo' in order to have been sexually harassed, however. Intimidation and hostility may occur without explicit sexual advances or acts of an explicitly sexual nature. Moreover physical aggression, violence, or verbal abuse may amount to sexual harassment." (citations omitted))

401. 72 F.3d 1191 (4th Cir. 1996).

402. *Id.* at 1195.

403. *Id.* at 1193.

404. *Id.*

405. *Id.*

became erect.⁴⁰⁶ They placed a broomstick up his buttocks.⁴⁰⁷ Although homosexual desire played no apparent part in the facts of *McWilliams*, proof of sexual orientation formed the centerpiece of the disagreement between the majority and the dissenting opinions in the court of appeals.

The majority reasoned that same-sex sexual harassment is only actionable under Title VII when motivated by homosexual desire and that homosexuality of the perpetrator is a necessary element that the plaintiff must prove.⁴⁰⁸ Taking cross-sex sexual harassment as the norm, the court assumed sexual attraction was requisite and present in those cases.⁴⁰⁹ Accordingly, since *McWilliams* presented no evidence of homosexual attraction, he had not proven his case.⁴¹⁰ Moreover, because no sexual attraction was present, no cause of action could lie if the harasser and victim were heterosexuals of the same sex.⁴¹¹ *McWilliams*, said the court, was harassed because of personal animosity due to his limited mental capacity; this type of behavior fell outside Title VII.⁴¹²

Judge Michael's dissent rejected the proof requirement of homosexuality, but did not question the requirement of sexual desire.⁴¹³ He stated that any physical abuse of a co-worker for sexual satisfaction or desire constituted sexual harassment without proof of homosexuality.⁴¹⁴ While correct as far as it relates to same-sex sexual harassment based on desire or attraction, the dissent like the majority, failed to recognize the existence of hostility-based sexual harassment claims. Because the majority and the dissent's original schema of sexual harassment was incomplete, they could not appropriately assess the facts in *McWilliams*.

A proper sexual harassment paradigm includes both attraction- and hostility-based sexual harassment claims. Sexual orientation is relevant only in attraction-based claims, and then, only as an explanation of the victim selection proc-

406. *Id.* at 1199 (Michael, J., dissenting).

407. *McWilliams*, 72 F.3d at 1193.

408. *Id.* at 1195.

409. *Id.*

410. *Id.* at 1195-96.

411. *Id.* at 1195 n.5; cf. *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138, 141 (distinguishing *McWilliams* because *Wrightson* had alleged his perpetrators were homosexual).

412. See *McWilliams*, 72 F.3d at 1195-96.

413. See *id.* at 1198 (Michael, J., dissenting).

414. *Id.*

ess.⁴¹⁵ Heterosexual desire is at the heart of cross-sex attraction causes of action. Homosexual desire occupies a parallel place in attraction-based, same-sex sexual harassment. When the sexual harassment claim is hostility-based, the key is the gender of the victim in both cross-sex and same-sex situations, and his or her implied inequality; the sexual orientation of the perpetrator is inconsequential.

The subordination of an individual because of a person's gender occurs in same-sex sexual harassment as well. Because the lesbian and gay male schema views gay men as less manly than non-gay men,⁴¹⁶ verbal and physical harassment of gay men (or men perceived to be gay)⁴¹⁷ reinforces traditional male gender roles. It separates the "non-male" from the workplace group and stigmatizes him as inferior—the same process that occurs in male on female sexual harassment. Further, as in *Winsor*, the original trigger for the harassment should be irrelevant to the analysis. Once workplace animosity has expressed itself in sexual behavior, sexual harassment has occurred.⁴¹⁸ The same-sex, or cross-sex factual construct is of no consequence.

McWilliams illustrates that same-sex physical interaction appears to foster an association with homosexuality which blinds courts to jurisprudential and precedential reality. *McWilliams*' degradation at the hands of his fellow em-

415. See *supra* notes 271-272 and accompanying text.

416. See *supra* notes 145-151, and accompanying text.

417. This article focuses on gay men rather than gay women because the cases primarily concern males rather than females, and because the lesbian and gay male schema more strongly associates homosexuality with loss of status with gay males. See, e.g., Case, *supra* note 152 at 26-27; SANDRA LIPSITZ BEM, *THE LENSES OF GENDER: TRANSFORMING THE DEBATE ON SEXUAL INEQUALITY*, 114 (1993) (describing the harsher treatment of effeminate boys "sissies" than of masculine girls "tomboys" even among preschool-aged children); cf. *Fudge v. Penthouse Int'l*, 840 F.2d 1012, 1016 (1st Cir. 1988) (finding the word "amazon" not libelous referring to girls. "There is a sufficiently wide spectrum of reasonable opinion as to what constitutes appropriate gender-related behavior for schoolgirls that it would be impossible to prove the truth or falsity of the statement that the girls are 'masculine women,'" which was alleged to be a defamatory definition of "amazon.").

418. *Winsor v. Hinckley Dodge, Inc.*, 79 F.3d 996, 1000 (10th Cir. 1996); *accord Quick v. Donaldson, Co.*, 90 F.3d 1372, 1379 (8th Cir. 1996) ("The district court also incorrectly concluded that the alleged harassment was not gender based because it found that the underlying motive was personal enmity or hooliganism. A hostile work environment is not so easily excused, however. The fact that Quick might have been unpopular could not justify conduct that otherwise violated Title VII.") (citations omitted).

ployees may have been ignited by his limited mental capacity, but took the form of an assault on his manhood.⁴¹⁹ Significantly, this assault on his masculinity manifested itself through feigned homosexual activity.⁴²⁰ Forcing him to receive a broomstick in his buttocks or pushing him to his knees to simulate fellatio is a gendered attack on McWilliams' manliness.⁴²¹ The lesbian and gay male schema's equation of male homosexual conduct with female gender roles makes this congruence possible. In both feigned sexual acts, the employees forced McWilliams to take the female role. Seen in this light, the fact that a harassed employee is gay or non-gay should be irrelevant. The true basis for the harassment is gender, not sexual orientation or mere crass behavior.

In *Dillon v. Frank*,⁴²² a male postal employee was verbally and physically harassed by fellow workers. Co-workers taunted Dillon, *inter alia*, with statements such as "fag," "Dillon sucks dicks," and "Dillon gives head."⁴²³ Although the United State Postal Service and the court saw this as sexual orientation harassment, and thus, non-actionable under Title VII, Dillon specifically disavowed that foundation for his claim.⁴²⁴ Analogizing his case to *Price Waterhouse*, he described his cause of action as "sex stereotyping," classifying certain behavioral characteristics as appropriate for one sex, but not the other.⁴²⁵ Dillon claimed that his co-workers abused him because they deemed him not macho enough for a man because he contravened their traditional gender expectations.⁴²⁶ Accordingly, like Ann Hopkins at Price Waterhouse, he was a victim of sex stereotyping.⁴²⁷

The Sixth Circuit rejected both Dillon's analogy and his analysis:

We find this argument unpersuasive, primarily because he has not shown that his co-workers would have treated a

419. See *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1193 (4th Cir. 1996).

420. *Id.*

421. *Id.*

422. *Dillon v. Frank*, 58 Empl. Prac. Dec. (CCH) ¶ 41,332, at 70,102 (6th Cir. 1992) (not certified for publication).

423. *Id.* at 70,102.

424. *Id.* at 70,105.

425. *Id.* at 70,105 n.3.

426. *Id.* at 70, 105.

427. *Id.*

similarly situated woman any differently. Dillon's argument must presume that the abuse was either directed at his supposed homosexuality or at the specific sexual practices (such as anal sex or fellatio) . . . Dillon has not shown such unisexual oppression: he has not argued that a lesbian would have been accepted at the Center, nor has he argued that a woman known to engage in the disfavored sexual practices would have escaped abuse. Without such a showing, his claim to have been discriminated against because he is a male cannot succeed.⁴²⁸

The court found Dillon's citation of *Price Waterhouse* to be similarly inapt:

Price Waterhouse v. Hopkins does not direct a different result. *Price Waterhouse* was not a hostile environment case. It involved . . . [an] allegation "that gender played a part in a particular employment decision." Because of this difference . . . we do not read the Court to mean that any treatment that *could* be based on sexual stereotypes would violate Title VII

In our case there is no evidence provided that Dillon's co-workers justified their outrageous behavior based on, or accompanied it with remarks indicating, a belief that his practices would be acceptable in a female but unacceptable in a male.

Further the Court emphasized the "intolerable and impermissible Catch-22" in the stereotyping in that case. A desirable trait (aggressiveness) was believed to be peculiar to males. If Hopkins lacked it, she would not be promoted; if she displayed it, it would not be acceptable. In our case, Dillon's supposed activities or characteristics simply had no relevance to the workplace, and did not place him in a "Catch-22."

Thus, the discussion of sexual stereotyping in *Price Waterhouse* does not support a holding that discrimination "on account of sex" was involved "in this case."⁴²⁹

The court misread Dillon's citation to *Price Waterhouse*. He claimed that co-workers' views of appropriate gender roles influenced their assessment and treatment of him. As

428. *Dillon v. Frank*, 58 Empl. Prac. Dec. (CCH) ¶ 41,333, at 70,102, 70,108-09 (6th Cir. 1992) (citing *Porta v. Rollins Envtl. Serv. (NJ), Inc.*, 654 F. Supp. 1275, 1279 (D.N.J. 1987) (graffiti alleging that "Judy sucks Bernie's dick" part of sexual harassment claim.)).

429. *Id.* at 70,108-09.

was true with Ann Hopkins, gendered schemas provoked the disparate treatment. Thus, the fact that his claim was for sexual harassment, and hers was for refusal to promote, is insignificant. While it was perhaps more obvious that Ms. Hopkins' partners viewed her as unwomanly,⁴³⁰ the particular verbal abuse heaped on Dillon demonstrates that his co-workers saw him as unmanly.⁴³¹ *Price Waterhouse* taught that gendered schemas generating different treatment of individuals in the workplace impose a term or condition of employment that members of the opposite sex do not suffer. This disparate treatment constitutes sex discrimination.⁴³²

Further, Ms. Hopkins' "Catch-22" may have exacerbated her predicament, but it is not the *sine qua non* of her sex discrimination cause of action. Whether or not aggressiveness or "masculine" characteristics were required for promotion to partnership, the partners reacted to Ms. Hopkins' possession of those traits as "unfeminine." The negative reaction formed the heart of her Title VII claim. The co-workers' imposition of their versions of gender-appropriate workplace behavior links *Price Waterhouse* to *Dillon*.⁴³³ Indeed, the very irrelevance of gender-typicality to Dillon's job increases his harassment. After all, if Ann Hopkins was truly too abrasive to be promoted, that characteristic would be a relevant partnership criterion.⁴³⁴ It is hard to believe that the effeminacy of a male postal worker bears on his job performance. Accordingly, the Sixth Circuit's reliance on the irrelevance of Dillon's assumed behavior in the workplace is misplaced.

More significantly, the Sixth Circuit fundamentally misconstrues Dillon's legal argument as the court's counter-examples in the first quote illustrate. In asking whether Dillon's fellow employees would have treated a similarly situated female differently, one cannot simply examine the treatment of lesbians or women who perform fellatio. Natu-

430. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 234-35 (1989).

431. See *infra* notes 437-444 and accompanying text.

432. *Accord Harris v. Forklift Sys.*, 510 U.S. 17, 25-26 (1993) (Ginsburg, J., concurring) ("The crucial issue is whether members of one sex are exposed to disadvantageous terms or conditions to which members of the other sex are not exposed.").

433. See *Price Waterhouse*, 490 U.S. at 251 ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . .").

434. *Id.* at 252.

rally, if lesbians working for the Postal Service had been treated better than gay males, there would have been a clear case of sex-plus discrimination.⁴³⁵ That was not Dillon's allegation. Since there was no evidence presented as to how the lesbians working for the Postal Service were, in fact, treated by their colleagues,⁴³⁶ we will never be able to assess this method of proving Dillon's case.

The court more correctly paid attention to the alleged discrimination; the abusive words: "Dillon sucks dicks."⁴³⁷ Nevertheless, it is too simplistic to inquire whether the co-workers would have harassed a woman in a similar manner with an abusive phrase like, "Judy sucks Bernie's dick." As courts have recognized in other sexual harassment cases, men and women play different roles in American society, and are sexually harassed in different ways.⁴³⁸ Verbal abuse registers differently according to the sex of the target.⁴³⁹

"Judy sucks Bernie's dick" may constitute sexual harassment⁴⁴⁰ because it reduces women to sexual beings and does not view them as workplace equals.⁴⁴¹ However, it does not connote that Judy is less than a woman or acting inappropriately for her gender.⁴⁴² "Dillon sucks dicks," on the

435. Cf. *DeSantis v. Pacific Tel. & Tel. Co. Inc.*, 608 F.2d 327, 331 (9th Cir. 1979) (employer policy that treats alike men and women who prefer sexual partners of the same sex is not sex discrimination).

436. Although it is fairly safe to assume that they would not have been accused of fellating men.

437. *Dillon v. Frank*, 58 Empl. Prac. Dec. (CCH) ¶ 41,332, at 70,102 (6th Cir. 1992).

438. The debate surrounding the use of the "reasonable woman" or "reasonable person" standard in sexual harassment cases is premised on this distinction. *E.g.*, *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (adopting the reasonable woman standard).

439. Cf. *Easton v. Crossl & Mortgage Corp.*, 905 F. Supp. 1368, 1383 (C.D. Cal. 1995) (the court contrasts the reactions to a hypothetical conversation about penis length that takes place between a man and a woman, two men or two women). See generally *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1493-94 (M.D. Fla. 1991) (sexual harassment claim based in part on pervasiveness of pornographic photos of nude women. A male employee testified that nude photos of women in the workplace were normal, photos of naked men "would be queer.").

440. *Porta v. Rollins Envtl. Servs. Inc.*, 654 F. Supp. 1275, 1279 (D. N.J. 1987).

441. FARLEY, *supra* note 259, at 14-15; see, e.g., *EEOC v. A. Sam & Sons Produce Co.*, 872 F. Supp. 29, 35 (W.D.N.Y. 1994); *Winsor v. Hinckley Dodge, Inc.*, 79 F.3d 996, 1000-01 (10th Cir. 1996).

442. Indeed, it may connote the opposite, that women are only good for sex. Cf. *A Sam & Sons Produce Co.*, 872 F. Supp. at 34-36 ("[A]ll [women] know how

other hand, is less a statement describing his possible sexual activity than a slur on his manhood. Real men are fellated, they do not perform fellatio.⁴⁴³ Thus, Dillon was separated from and excoriated by his fellow postal workers because of maleness, or perceived lack thereof. As the Supreme Court stated in *Price Waterhouse*, "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group"⁴⁴⁴

Viewed in this light, *Carreno v. International Brotherhood of Electric Workers*,⁴⁴⁵ illustrates the case of sexual harassment of a gay electrician. Plaintiff Carreno, too, was called "faggot" and "Mary."⁴⁴⁶ Once again, the equation of male homosexuality with "femaleness" or cross-gender identity, forms the core of the gay male schema and the core of the harassment. This attribution is exhibited by the choice of verbal epithets. Accordingly, it is not the employee's homosexuality *vel non* that is the source of the discrimination, but the rigorous enforcement of traditional male gendered behavior in the workplace. As a gay man, Carreno was called by a woman's name and treated sexually as a female. This point was also made by the sexual conduct perpetrated on McWilliams by his co-workers.⁴⁴⁷

We need to carefully distinguish discrimination on the basis of homosexuality from discrimination on the basis of gender-atypicality. If their fellow workers had truly harassed Carreno and Dillon merely because they were gay men (or assumed to be gay), Title VII would not apply.⁴⁴⁸ How-

to do [is] fuck.").

443. Accord e.g., George Chauncey Jr., *Christian Brotherhood or Sexual Perversion?: Homosexual Identities and the Construction of Sexual Boundaries in the World War I Era*, in *HIDDEN FROM HISTORY*, *supra* note 70, at 294, 297, (discussing the selective labeling of men engaged in homosexual activity as "straight" or "queer" by which sexual and gender role he assumed); C.A. TRIPP, *THE HOMOSEXUAL MATRIX* 125-31 (1987) (discussing ways men deny their homosexuality, including using the assumption of the male role in homosexual activity to absolve that individual of homosexuality).

444. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

445. *Carreno v. International Bhd. of Elec. Wkrs., Local No. 226*, 54 Fair Empl. Prac. Cases (BNA) 81, 81 (D. Kan. 1990).

446. *Carreno*, 54 Fair Empl. Prac. Cases (BNA) at 81.

447. See *supra* note 407 and accompanying text.

448. See, e.g., *DeSantis v. Pacific Tel. & Tel. Co. Inc.*, 608 F.2d 327 (9th Cir. 1979); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 1158 (1990).

ever, Title VII prohibits discrimination on the basis of gender-typicality through harassment and intimidation.⁴⁴⁹ Due to the persistence of the lesbian and gay male schema and its equation of cross-gender behavior with homosexuality, distinguishing these two situations appears difficult. Nevertheless, judges must make this distinction in order to accurately enforce the mandates of Title VII's sex discrimination provisions.

A simple parallel aids in this analysis. In many areas of the United States, cigar smoking has become fashionable—even among women.⁴⁵⁰ Assume that a woman smokes cigars on the job and her co-workers verbally abuse her for doing so. There may be legal prohibitions against discrimination on the basis of smoking, and some people may consider smoking reprehensible conduct.⁴⁵¹ Harassment due to anti-smoking sentiment is unrelated to gender. Even though a woman is its target, the conduct is not covered by Title VII. If the harassment is triggered by a *woman* smoking cigars; viz. that cigar smoking is considered inappropriate behavior for women, there *is* sex discrimination. Anti-smoking sentiments may exist in the workplace. Nevertheless, if objection to cigar smoking provokes harassment because it is considered gender-inappropriate behavior, then judges should recognize it as sex discrimination, even if there are no male cigar smokers in the workplace as comparators. There is a world of difference, in reality and in legal doctrine, between fellow employees commenting, "That cigar stinks and so do you" and "So, are you going to take up spitting and cussing, too?" The difference is sex discrimination.

Additionally, the same incident of harassment can be intended and/or read differently depending on the sex of the target. If co-workers made the spitting and cussing comment to a male cigar smoker, its meaning would be different. It might be an attack on the offending male employee's crassi-

449. *Accord Price Waterhouse*, 490 U.S. at 251.

450. See, e.g., Melanie Wells, *Tobacco Vogue: Women Fire Up Cigars, Put 'She' in Hedonism*, USA TODAY, June 25, 1996, at 1B; Chris West, *So This is Glamorous?*, STATE JOURNAL-REGISTER (Springfield, IL), July 7, 1996, at 17; Anita Creamer, *Blowing Smoke in the Demi-Monde*, SACRAMENTO BEE, July 8, 1996, at C1.

451. Cf. *Romer v. Evans*, 116 S. Ct. 1620, 1633 (1996) (Scalia, J., dissenting) (equating Colorado Amendment 2 with expressing disapproval of other "reprehensible conduct:" murder, polygamy, cruelty to animals).

tude or lack of refinement. It would not impugn his masculinity (and could even signify the opposite). Directed at women, however, the reference to spitting and cussing maligns her femininity.

As in *McWilliams*, gay men (Carreno) or assumed gay men (Dillon) are not the sole targets of this type of sexual harassment. Recall Anthony Goluszek, the unmarried, easily blushing mechanic who lived with his mother and was abnormally sensitive to comments about sex.⁴⁵² The record is silent as to Goluszek's effeminacy, assumed or actual sexual orientation.⁴⁵³ It is clear, however, that Goluszek's fellow workers abused him by impugning his manhood. He was teased that "his daddy" [a fellow Polish worker] would have to be called in if Goluszek could not fix machinery.⁴⁵⁴ He was told in crude and sexually explicit ways that he needed to have sexual intercourse with women.⁴⁵⁵ He was asked whether he was gay or bisexual, and was poked in the buttocks with a stick.⁴⁵⁶ It is unclear whether these last incidents indicated a serious question in the minds of the other employees regarding Goluszek's sexual orientation or whether they were simply a logical extension of the belittling of his manhood.

In either situation, the court correctly stated that Goluszek was harassed because he was a male and that similar comments made to women would have been treated differently by the employer.⁴⁵⁷ Thus, if the plaintiff had been a woman, the court would have permitted her Title VII suit.⁴⁵⁸ The court's different treatment of these two situations stemmed from its self-imposed rule of gender domination in Title VII claims, and from its blindness to gender subordination where Goluszek himself was concerned. The court ignored the fact that *Goluszek* illustrated disparate treatment based upon gender-specific expectations for individual behavior, as in *Price Waterhouse*, and should therefore have stated a sexual harassment claim under Title VII.

452. *Goluszek v. Smith*, 697 F. Supp. 1452, 1453 (N.D. Ill. 1988).

453. *Id.* at 1453-55. Some employees questioned Goluszek about his sexuality. *Id.* at 1454.

454. *Id.* at 1453.

455. *Id.* at 1453-54.

456. *Id.* at 1454.

457. *Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988).

458. *Id.*

Had the *Goluszek* court been more sensitive to the facts before it, it should have seen the insistence on traditional gendered behavior in the workplace as evidence of gender domination/subordination. The court's own language is instructive. Goluszek's co-workers "foster[ed] a sense of degradation in the victim by attacking [the victim's] sexuality."⁴⁵⁹ "Such severe sexual harassment becomes discriminatory because it deprives the victim . . . of the right to participate in the workplace on an equal footing with others similarly situated."⁴⁶⁰ The court could have been referring to Goluszek himself, instead of presenting a counter-example of gender domination of female employees. That it did not, says more about the limitations in the court's analysis and the pervasiveness of the lesbian and gay male schema in that analysis, than the worth of Goluszek's claim.⁴⁶¹

In the October 1997 term, the Supreme Court will decide *Oncale v. Sundowner Offshore Services, Inc.*,⁴⁶² a male on male sexual harassment case under Title VII. Although the facts of *Oncale* are sketchy, the case may serve as a reminder of some of the themes of this article. Joseph Oncale worked as a roustabout on an offshore oil rig and was sexually harassed by his supervisor, John Lyons, and two co-workers, Danny Pippen and Brandon Johnson. He alleged that Pippen and Johnson held him down while Lyons placed his penis once on Oncale's neck and once on his arm. Lyons and Pippen threatened Oncale with homosexual rape and Lyons sodomized Oncale with a bar of soap in Sundowner's shower while Pippen restrained him.⁴⁶³ The Fifth Circuit dismissed Oncale's claim, reluctantly ruling that the law of the circuit, *Garcia v. Elf-Atochem North America*,⁴⁶⁴ denied recovery under Title VII for same-sex sexual harassment.⁴⁶⁵

Oncale exemplifies the ways in which flawed schemas can lead to flawed legal doctrine. The schema of lesbians and

459. *Id.* (citing Note, *supra* note 333, at 1455).

460. *Id.* (questioning *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 213 (7th Cir. 1986)).

461. See *supra* notes 452-460 and accompanying text.

462. *Oncale v. Sundowner Offshore Servs.*, 83 F.3d 118 (5th Cir. 1996), *en banc denied*, 95 F.3d 56 (5th Cir. 1996), *cert. granted*, 65 U.S.L.W. 3814 (Jun. 9, 1997) (No. 96-568).

463. *Id.* at 118-19.

464. *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446 (5th Cir. 1994).

465. *Oncale*, 83 F.3d at 119-20.

gay men equates gay identity with predatory, indiscriminate sexual activity. Thus, when gay people perpetrate sexual harassment based on desire against non-gay persons, the flawed schema coincides with the facts of these cases. Faced with this type of unwelcome sexual conduct, many courts appropriately apply Title VII doctrine.

The dominance of this schema has provoked some courts, notably the Fourth Circuit, to limit same-sex sexual harassment claims under Title VII solely to that scenario. In the Fourth Circuit, sexually-themed behavior among men is only actionable if it is attraction-based conduct of a homosexual nature. Accordingly, in order to prevail, Oncale would have to show that Lyons and the others were gay, so that the court would assume they desired him as a sexual object.⁴⁶⁶ Like the Fourth Circuit, the Sixth and Eleventh Circuits would also grant Oncale relief if he could show homosexual, attraction-based harassment.⁴⁶⁷ Both of the latter circuits, however, have assiduously avoided discussing the possibility of same-sex sexual harassment without evidence of homosexuality,⁴⁶⁸ perhaps because their schemas of same-sex sexual harassment were too limited for them to clearly sort through the issues.⁴⁶⁹ It is unfortunate for Oncale that the facts of his case appear to lie outside the narrow scenario where the lesbian and gay male schema of predatory sex and sexual harassment easily overlap.

Because the Fifth Circuit precedent in *Garcia* is an absolute bar to relief, there was little need to develop any facts in *Oncale* other than the sex of the plaintiff and defendants.⁴⁷⁰ Thus, we do not know if Lyons or the others were sexually attracted to Oncale or acting hostile towards to him,

466. See *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 141 (4th Cir. 1996); *McWilliams v. Bd. of Supervisors*, 72 F.3d 1191, 1195 n.4 (4th Cir. 1996).

467. See *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443, 448 (6th Cir. 1997); *Fredette v. BVP Management Assocs.*, 112 F.3d 1503 (11th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3170 (U.S. Aug. 20, 1997) (No. 97-330).

468. See *Yeary*, 107 F.3d at 448; *Fredette*, 112 F.3d at 1507.

469. Although both the Sixth and Eleventh Circuits recognized that the Fifth Circuit rule in *Garcia* was developed in exactly that situation, those courts seemed relieved that the facts in the cases before them did not raise those issues. See *Yeary*, 107 F.3d at 448; *Fredette*, 112 F.3d at 1507.

470. *Accord* *Myers v. City of El Paso*, 874 F. Supp. 1547, 1548 (W.D. Tex. 1995) ("[T]here [was] no dispute as to the material facts that Myers is a female, as is her superior, Sanchez. Under Fifth Circuit law, Myers' claim of sexual harassment must fail.").

although the conduct in question would appear to favor the latter. Nor do we have evidence that Oncale's co-workers believed him to be gay⁴⁷¹ or whether they targeted him for harassment for some other reason. Nevertheless, given the extreme sexual nature of the behavior in the case, it is unlikely that a court would deny relief to a woman similarly harassed, regardless of the motivation. In fact, the Tenth Circuit in *Winsor v. Hinkley Dodge Company* expressly held that, even if the original motivation for cross-sex harassment was gender neutral, its expression in a sexual manner made it sex discrimination.⁴⁷² The Eighth Circuit in *Quick v. Donaldson Company* correctly stated that sexually-themed behavior among members of the same sex could also constitute sexual harassment, even if the motive was personal animosity.⁴⁷³

Since the potential for the lesbian and gay male schema to skew perception and legal doctrine is so strong, the Supreme Court should be mindful of what the facts do and do not involve. *Oncale* appears to be a hostility-based, male-male sexual harassment matter in which the motive for the harassment does not involve Oncale's sexual orientation. Thus, the Supreme Court should not be influenced by the distorting effect of anti-gay motive which figured so prominently in *Dillon* and *Carreno*.⁴⁷⁴ Nor should the Court be misled, on these facts, to search for a gendered power imbalance, as the Fifth Circuit apparently did in *Garcia*,⁴⁷⁵ the precedent cited in *Oncale*. Rather, the Supreme Court should follow the reasoning of the Eighth Circuit and hold that same-sex, sexually-themed, unwelcome behavior, may constitute sexual harassment.

471. *Oncale v. Sundowner Offshore Servs.*, 83 F.3d 118, 118-19 (5th Cir. 1996). Indeed, the word "homosexual" only appears three times in the opinion. Once as an adjective modifying "rape" describing the threats of male on male sexual assault, *id.* at 118, and twice in the court's final footnote within quotes from other circuit court cases. *Id.* at 120 n.3.

472. *Winsor v. Hinkley Dodge, Inc.*, 79 F.3d 996, 1000 (10th Cir. 1996); see discussion *supra* notes 359-400 and accompanying text.

473. *Quick v. Donaldson Co.*, 90 F.3d 1372, 1379 (8th Cir. 1996).

474. See *supra* notes 422-447 and accompanying text.

475. *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994). In *Garcia*, the citation to *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988) is cryptic, at best. *Garcia*, 28 F.3d at 452; see also *supra* text accompanying notes 294-09.

V. PRESCRIPTION AND CONCLUSION

Although same-sex sexual harassment is the current controversy before the Supreme Court, it will certainly not be the last involving same-sex or gay issues. In the 1997-1998 term, the Court will decide *Baker v. General Motors Corporation*,⁴⁷⁶ a Full Faith and Credit clause case with ramifications for the national recognition of same-sex marriages should they become legal in one or more states.⁴⁷⁷ As gay persons and issues continue to appear in the courts, jurists will be called on to extend existing jurisprudence to these matters and people. If history is any guide, the results will be inconsistent, at best.

The goal of this article has been to identify and directly challenge⁴⁷⁸ inconsistent precedent and doctrine skewed by flaws inherent in the lesbian and gay male schema. These challenges not only illustrate that the flawed schema has warped legal doctrine, but it may create an opportunity for jurists to reexamine both those schemas and the consequent jurisprudential conclusions.

Given the power of the lesbian and gay male schema to distort legal doctrine, we need to modify the schema before jurisprudence in these areas can change. Schemas are resistant to alteration; contradictory information is often discounted or ignored rather than incorporated.⁴⁷⁹ Moreover, social science research informs us that mere awareness of the presence of a schema is insufficient to modify it. Neither good intentions, nor admonitions not to use preexisting schemas are adequate.⁴⁸⁰ Awareness and a desire for change are important, but they are not enough.

Rather, the most opportune time for change appears to

476. *Baker v. General Motors Corp.*, 86 F.3d 811 (8th Cir. 1996), cert. granted, 65 U.S.L.W. 3644 (U.S. Mar. 25, 1997) (No. 96-653).

477. See, Linda Greenhouse, *Supreme Court Roundup: Court Weighs States' Legal Reciprocity*, N.Y. TIMES, Mar. 25, 1997, at A18.

478. Cf. Donald Meichenbaum, *Cognitive Behavior Modification*, in HELPING PEOPLE CHANGE, *supra* note 10, at 346 (discussing the goals of cognitive restructuring therapies).

479. But Cf. Karen Farchaus Stein, *Complexity of Self-Schema and Responses to Disconfirming Feedback*, 18 COGNITIVE THERAPY AND RESEARCH 161, 161 (1994).

480. See also *supra* note 10, at 94 (Social science practitioners' schema-motivated bias not significantly reduced); John Bransford et al., *Teaching Thinking and Problem Solving: Research Foundations*, 41 AMERICAN PSYCHOLOGIST 1078 (1986).

be when the existing schema ceases to function adequately;⁴⁸¹ that is, when the schema does not properly represent factual circumstances or generate legal outcomes consistent with appropriate precedent. Lesbians and gay men and their advocates can accentuate this disfunctionality by identifying discordant legal precedent, and by exposing judges and the public to the variety of gay life counter to the existing schema.

As courts, commentators and lawyers continue to examine the effects of the lesbian and gay male schema on law, the use of analogy may serve as a disconfirming tool to expose erroneous legal doctrine. Faced with the Supreme Court's decision in *Price Waterhouse v. Hopkins*, holding that forced adherence to gender typicality for women violated Title VII, a critically thinking jurist must reexamine his or her beliefs about how the law should treat effeminate men.⁴⁸² Similarly, unwanted sexual behavior towards a female subordinate by her male superior is equally actionable when the supervisor is a woman.⁴⁸³ A divorced mother's cohabitation with another woman is no more relevant to a child custody proceeding than is her relationship with a male of another race.⁴⁸⁴ By confronting decision-makers with inconsistent and contradictory precedent, we can assist in the erosion of the functionality of the flawed schema of lesbians and gay men.

Demonstrating the disfunctionality of the lesbian and gay male schema in legal precedent is only one avenue to change. The schema itself must stop appearing to properly encapsulate lesbians and gay men. Legislators and jurists must have access to examples of gay persons whom they cannot neatly place within the traditional schema. In addition to the fact that people frequently discard contradictory information inconsistent with their schemas,⁴⁸⁵ another well-known psychological phenomenon increases the difficulty of this

481. Stein, *supra* note 430, at 162. As for example, when the high school valedictorian needs to accommodate her "naturally smart and effortlessly successful" self-schema to her mediocre first semester college grades. *Id.*

482. Compare *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), with *Smith v. Liberty Mut. Ins. Co.*, 395 F. Supp. 1098 (N.D. Ga. 1975).

483. Compare *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986), with *Myers v. City of El Paso*, 874 F. Supp. 1546 (W.D. Tex. 1995).

484. Compare *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995), with *Palmore v. Sidotti*, 466 U.S. 429 (1984).

485. BROWER & NURIUS, *supra* note 10, at 14; e.g., Stein, *supra* note 430, at 161.

task. Information that is particularly distinctive, vivid or significant to the observer tends to be the most accessible for recall and use. The more typical, socially expected or accepted the information is, the more readily it recedes in value and awareness.⁴⁸⁶ Thus, the most non-normative and atypical aspects of lesbian and gay male lives are the most striking, memorable, and most easily incorporated into the schema. Such aspects reinforce the schema of lesbians and gay men as different and apart from standard legal responses and existing precedent and doctrine.

For example, in *Nabozny v. Podlesny*,⁴⁸⁷ a gay male high school student was physically, verbally, and emotionally harassed by fellow students because he was gay. The Seventh Circuit reversed the district court and reinstated Nabozny's federal equal protection claim that school officials treated his harassment differently from student harassment of girls in the district.⁴⁸⁸ Nabozny claimed that the school district aggressively punished the perpetrators of female harassment, but told him that, as an openly gay student, he should expect such treatment, and that "boys will be boys."⁴⁸⁹ The idea that an openly gay student deserves harassment while an openly non-gay student does not evidences the erroneous belief that lesbians and gay men are meaningfully different and should be accorded different treatment; traditional precedent does not apply. Indeed, the awkwardness of the expression "openly non-gay"⁴⁹⁰ to describe the sexuality of other students

486. BROWER & NURIUS, *supra* note 10, at 88; TVERSKY & KAHNEMAN *supra* note 10, at 1124-31.

487. 92 F.3d 446 (7th Cir. 1996).

488. *Id.* at 454-55.

489. *Id.* at 451-52.

490. The whole question of flaunting, distinguishing between open and not open gay people runs throughout the relationship of lesbians and gay men to law. See, e.g., David Cole and William Eskridge, *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319 (1994) (discussing "Don't Ask, Don't Tell," the current military policy on the compatibility of homosexuality and the armed services). This topic is beyond the scope of this article. See also, *S.E.G. v. R.A.G.*, 735 S.W.2d 164, 166-67 (Mo. Ct. App. 1987) (discussing the activities of a mother in a lesbian relationship as imposing her sexuality on her children and the community, and therefore unfit to have custody or visitation). "She [the mother] has chosen not to make her sexual preference private but invites acknowledgment and imposes her preference upon her children and her community"; 142 CONG. REC. S.9986-01, (daily ed. Sept. 6, 1996) (remarks of Sen. Nickles (R-Okla.), discussing the Employment Non-Discrimination Act, a proposed amendment to the Defense of Marriage Act, see *supra* note 26). Senator

illustrates how little we consider the public nature of heterosexuality. It also demonstrates the automatic triggering of the characteristic "different" within the lesbian and gay male schema.

This focus on atypicality tends to flatten out the picture of the diversity of lesbians and gay men and their lives.⁴⁹¹ For example, media depictions of gay pride parades have usually focused on the more outré aspects and personalities in these events and ignored the less sensational participants and spectators.⁴⁹² To some degree, that attention inheres in the concept of newsworthiness.⁴⁹³ However, repeated portrayals of this type reinforce an acceptance of the image as

Nickles stated:

I know a lot of people, when they think of gays and lesbians, they think of individuals they know that are monogamous, and they are great employees, super people to work with, very productive. I know that. But there are also a lot of very active people, who work to pursue an activist agenda, and they would like to use the courts, as they have in many ways, to pursue their agenda. That is the reason why they are suing the Boy Scouts. That is the reason why they have sued in the State of Hawaii. We will talk about that on Tuesday [on the Defense of Marriage Act], to try to define marriage, and about allowing same-sex partners.

142 CONG. REC. S.9998-99.

491. The homogenization of gay people's diverse lives into one "gay lifestyle" is a common error of attribution. See, e.g., Dan Morain, *Assembly OKs Bill Banning Anti-Gay Bias But Rejects Another*, L.A. TIMES, Jun. 5, 1997, at A3; Andrew Barron, *Arts Funding in Peril*, NEWS & RECORD (GREENSBORO, N.C.), May 24, 1997, at A1; Aimee Green, *No Review of Gay Books—Purchase Is Called Done Deal*, *Librarians Will Field Complaints*, SEATTLE TIMES, May 20, 1997, at B1. Tellingly, courts had once described interracial marriages as a "lifestyle" to create the same marginalizing effect prior to the Supreme Court's decision in *Palmore v. Sidotti*. See *Palmore v. Sidotti*, 466 U.S. 429, 431 (1984) (citing the Record at 84 where the lower court changed custody from the mother because "the wife has chosen for herself and her child, a lifestyle unacceptable to the father and to society.").

492. E.g., MARSHALL KIRK & HUNTER MADSEN, *AFTER THE BALL*, 195 (1989); Don Romesburg, *Media Watch: Pride Media Round-Up*, BAY AREA REPORTER, July 10, 1997, at 12 (describing Reuters news service coverage sensationalizing the 1997 San Francisco gay pride parade, as well as describing the depiction of other pride parades by other media). This had led some gay commentators to call for restrictions on public behavior and persons which would reinforce negative perceptions of gay people, Kirk & Madsen, *supra* at 279, 307-312, and for a public relations campaign aimed at showing how mainstream gay people are. *Id.* at 197-245. That is not my position; rather, gay people should pick and choose the mechanisms of advocacy, including images, that are best suited to achieving change.

493. Cf. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 755 (1985) (appearing to resurrect the "newsworthiness" concepts of *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971)); see also, *Time, Inc. v. Firestone*, 424 U.S. 454 (1976).

genuine.⁴⁹⁴ Accordingly, lesbians, gay men, and their advocates need to provide judges and other decision-makers with sufficient counter-examples to the lesbian and gay male schema to overcome the inertia of extant thought patterns and to provoke recognition of the lack of functionality in applying the schema to individual gay people and their cases.⁴⁹⁵

However, recent work in behavior modification has led some to the conclusion that the reeducation/communication model⁴⁹⁶ of schema and behavioral modulation is most useful when the subject is highly open and desirous of change. We can imagine people along a continuum from those most ready and willing to alter their schemas and conduct to those most resistant to modification. Reeducation appears to work best with the former group, seems ineffective at the latter extreme, and provides mixed or short-term results with the majority of people in the middle.⁴⁹⁷

Thus, some researchers have posited that the uneven results of the reeducation/communication model stems from that model's serving the needs of society and its agents without meeting the requirements of the change target. The target is already manifesting its own perception of its self-interest through its current schemas and behavior.⁴⁹⁸ For most individuals, therefore, it is more effective to appeal to

494. See, e.g., ISAY, *supra* note 139, at 49 (discussing how one adolescent had so internalized this image that he did not believe that he was truly gay because he did not identify himself with that portrayal).

By use of the word "genuine" the author does not mean to imply that lesbians and gay men are just like non-gay men and women. Many differences do exist, both within the gay population, and among the groups, gay, non-gay and bisexual. Moreover, minimizing these differences can be harmful or misleading. E.g., Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 1028-29 (1991); MARTHA MINOW, MAKING ALL THE DIFFERENCE, 237 (1990). Nevertheless, in the context of the legal doctrines the article discusses, sameness outweighs difference.

495. Other commentators have suggested similar uses for counter-examples to alter judicial perceptions. Fajer, *supra* note 2, at 522-23; cf. Lynne Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1638, 1642 (1987) (stating that the mistake of plaintiff's advocates in *Bowers v. Hardwick* was to present Hardwick's case too abstractly, rather than in a manner that would engender empathy).

496. See, e.g., Michael L. Rothschild, Carrots, Sticks, and Promises: A Conceptual Framework for the Behavior Management of Public Health and Social Issues (University of Wisconsin, Madison) (unpublished paper, on file with the *Santa Clara Law Review*).

497. See generally *id.*

498. See *id.*

their self-interest, to discover what their beliefs or behaviors contribute to them, and to substitute a different or "better" product.⁴⁹⁹ We might then engage in marketing to encourage the individual to adopt new schemas and replace the old.⁵⁰⁰

Schemas provide efficiency in processing information, and supply shorthand guides to dealing with novel people, events or situations.⁵⁰¹ Moreover, they allow us to view events and situations as orderly and rational, rather than as random occurrences.⁵⁰² Therefore, any substitute schema about lesbians and gay men must, at a minimum, provide those things. Further, the persistence of counter-factual beliefs about gay people, such as the view that all gay people exhibit gender atypical behavior, or that gay identity is solely a matter of sexual conduct, may demonstrate that those aspects of the lesbian and gay male schema fulfill other needs in the persons who hold them.⁵⁰³ Accordingly, any replacement schema would also have to address these demands. Like consumer product marketing, the marketing of behavior or schema change may have to downplay certain interests and create or strengthen others.⁵⁰⁴ This complexity may ex-

499. *See id.*

500. Professor Rothschild describes this as social marketing, an exchange between two or more parties where each is seeking to maximize its own self-interest while recognizing the need to accommodate the other's self-interest. *Id.*

501. *See supra* notes 35-45 and accompanying text.

502. *See supra* notes 230-231 and accompanying text.

503. *Cf. Hunter, supra* note 227 (arguing that opposition to same-sex marriage stresses the fact that it would undermine male dominant/female passive roles); *see generally*, *Case supra* note 152, at 28-31, 35 n.105-36 n.110 (describing the different societal views of masculine women and feminine men, and of masculinity and femininity in general).

504. *E.g.*, Leslie Savan, *Oh Grow Up—Media, The Sell*, VILLAGE VOICE (NY), July 23, 1996, at 18 (describing the ad campaign of Dewar's scotch as trying to get the consumer to exchange ideas about scotch drinking with different images and perceptions). Note also the change in the marketing and perception of cigars from smelly and stodgy standbys for middle-aged men to trendy and cool accouterments for young people of both sexes. *See, e.g.*, David Brown, *Teen Cigar Use Surprisingly Prevalent; CDC Study Shows 27 Percent of High Schoolers Smoked One in Past Year*, WASHINGTON POST, May 23, 1997, at A3 ("Nancy Kaufman, an epidemiologist at the Robert Wood Johnson Foundation who conducted the survey, said she believes teenage cigar use is the product of advertising campaigns whose purpose is to make glamorous and sexy a product previously associated with middle-aged and elderly men."). Note, too that cigar advertising downplays the associated health risks. *See, e.g.*, Phil Willon, *Cigar Industry a Smoking Issue for Federal Regulators*, TAMPA TRIBUNE, Feb. 24, 1997, at 1 (discussing the different regulations on advertising and perceptions of cigar and cigarette smoking); Valli Herman, *Cigar Chic: Fashion indus-*

plain the slow pace of change on social issues.⁵⁰⁵ The road to modifying the lesbian and gay male schema, to lessen its distorting effect on legal doctrine, will be a long one. Such change cannot be accomplished through rational discussion and reeducation alone.

Nevertheless, gay visibility has increased with the Court's recent decision in *Romer*,⁵⁰⁶ *Oncale* presently before the Supreme Court, gay rights issues being currently debated in Congress and state legislatures,⁵⁰⁷ and the presence of gay and lesbian characters in the popular media.⁵⁰⁸ Such gay visibility increases the opportunities for change. The fact that we can debate gay marriage, for example, and that the concept is comprehensible to us, even if rejected, is a dramatic illustration of incipient societal schema modification.⁵⁰⁹ Dissenting in *United States v. Virginia*,⁵¹⁰ Justice Scalia censured the majority for using hindsight and modern values to criticize the nineteenth century exclusion of women from public education. "Close-minded they were – as every age is, including our own, with regard to matters it cannot guess,

try glamorizes smoking, DALLAS MORNING NEWS, Dec. 1, 1996, at 1J (discussing the images associated with cigar smoking and their critics, and quoting a spokesperson for Saks Fifth Avenue who likened smoking cigars to wearing fur, "it isn't a debate we take part in, . . . [e]veryone has a right to wear fur or not wear fur, just as everyone has a right to smoke cigars or not smoke cigars.").

505. For example, the change in the schema of marriage to admit interracial couples may still not be complete. See, e.g., Trosino, *supra* note 25, at 1, nn.1-3 (discussing recent polls finding that most Americans still disapprove of interracial marriage). However, it is no longer unthinkable, as it once was, nor viewed as not really a marriage. See *supra* note 98 and accompanying text.

506. *Romer v. Evans*, 116 S. Ct. 1620 (1996); see discussion *supra* Part II.

507. See, e.g., *Hawaii Seeks Law to Block Gay Marriage*, N.Y. TIMES, Apr. 18, 1997, at A15; Linda Greenhouse, *Supreme Court Roundup, Court to Weight States Legal Reciprocity*, N.Y. TIMES, Mar. 25, 1997, at A18; Kit Roane, *N.J. Law: Gay Couples and the Law, at Odds Over the Right to Marry*, N.Y. TIMES, Feb. 2, 1997, at 13NJ7.

508. See, e.g., Caryn James, *A Message That's Diminished by the Buildup*, N.Y. TIMES, Apr. 13, 1997, at 35 (discussing the coming out as a lesbian of Ellen Degeneres and the character she plays on television); *Word for Word/The Gay Nineties: Since Coming Out Is In, A Guide for TV Audiences*, N.Y. TIMES, Feb. 23, 1997, § 4, at 7 (discussing the gay and lesbian characters on television).

509. Some newspapers have begun the practice of running marriage announcements for gay couples' commitment ceremonies. See, e.g., Hamil Harris, *NOW Protests Post's Policy on Gay Marriage; Paper Declines to Run Some Wedding Notices*, WASHINGTON POST, Feb. 15, 1997, at D3 (announcements printed in papers in diverse locations, e.g., Minneapolis, Minnesota, Albany, New York, San Jose, California, El Paso, Texas, but not in the *Washington Post* or *New York Times*).

510. *United States v. Virginia*, 116 S. Ct. 2264 (1996).

because it simply does not consider them debatable.”⁵¹¹ His insight is apt; our view of the world may blind us to seeing it as it really is. By revealing the flawed schema of lesbians and gay men as well as the distortions of legal doctrine that occur as a consequence, these matters not only become debatable, they become modifiable. While not a complete response to these distortions, visibility and debate are a necessary first step to affording a more accurate legal treatment of lesbians and gay men and to a more consistent jurisprudence—so that society no longer makes its gay citizens strangers to its laws.

511. *Id.* at 2291 (Scalia, J., dissenting).